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In The Supreme Court of the United States

JANELL RUTHERFORD, et al.,
Petitioners,

v.

CITY OF CLEVELAND, et al.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the automatic extending of racial quotas in hiring police officers without a showing of a "compelling interest" based on contemporaneous racial discrimination violates the Fourteenth Amendment Equal Protection clause of the United States Constitution.

2. Whether a Consent Decree which automatically extended its provisions including a racial quota for hiring police officers for an additional two years from 1992 to 1994 was not "narrowly tailored" in relationship to the numerical goals of the relevant labor market in violation of the Fourteenth Amendment Equal Protection clause of the United States Constitution.

3. Whether a Consent Decree was not "narrowly tailored" as required by the Fourteenth Amendment Equal Protection clause of the United States Constitution by 1992 when it automatically extended its provisions including a racial quota for hiring police officers for an additional two years even though there had been eighteen years of job related and validated civil service examinations given under its terms.

4. Whether a Consent Decree was not "narrowly tailored" in the duration as required by the Fourteenth Amendment Equal Protection clause of the United States Constitution by 1992 when it automatically extended its term including a racial quota for hiring police officers for an additional two years.

5. Whether a Consent Decree was not "narrowly tailored" in the classification's burden on non-minorities as required by the Fourteenth Amendment Equal Protection clause of the United States Constitution by 1992 when it automatically extended its provisions including a racial quota for hiring police officers for an additional two years.

6. Whether a Consent Decree was not "narrowly tailored" in the flexibility of the numerical goals as required by the Fourteenth Amendment Equal Protection clause of the United States Constitution by 1992 when it automatically extended its provisions including a racial quota for hiring police officers for an additional two years.

PARTIES TO THE PROCEEDING

Petitioners are class representatives Janell Rutherford, Judy Torres, John Rajic, Kevin Riley, and Richard Dembie and a certified class of persons similarly situated who are non-minorities and took the 1992 Entry-Level Police civil service test given by the City of Cleveland.

Respondents are the City of Cleveland and in their official capacities the Mayor, Police Chief, Director of the Safety Department and members of the Civil Service Commission of the City of Cleveland.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Janell Rutherford, Judy Torres, John Rajic, Kevin Riley, and Richard Dembie and a certified class of persons similarly situated who are non-minorities and took the 1992 Entry-Level Police civil service test given by the City of Cleveland respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and

is reproduced in the Appendix at App. 1a. The opinion of the District Court granting summary judgment on the constitutionality of the Consent Decree is unreported and is reproduced in the Appendix at App. 41a.

JURISDICTION

The Court of Appeals judgment was entered on June 1, 2006. A timely petition for rehearing was denied on September 15, 2006. App. at App. 150a. The Honorable John Paul Stevens, Circuit Justice granted two extensions to the Petitioners to file this petition. The second granted the Petitioners until February 12, 2007. This petition is therefore timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part that: "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Petitioners seek review of the ruling of the Sixth Circuit Court of Appeals which held constitutional the imposition of race based affirmative action in hiring of entry level police officers for the City of Cleveland which had been

scheduled to end in 1992, but under the terms of the 1984 Amended Consent Decree ["ACD"] was automatically extended for an additional two years without the municipality providing evidence of a current compelling interest or that the decree continued to meet the constitutional mandates found in the decisions of this court in *United States v. Paradise*, 480 U.S. 149, 169-170 (1987) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989). Judge Rogers in his *Rutherford* concurring opinion proclaimed "[i]n my view, for the reasons given in the majority opinion, we cannot say that the ACD was so clearly unconstitutional as to require the City sua sponte to have sought modification in 1992..." *Rutherford v. City of Cleveland,* Case No. 04-3904 (6th Cir. June 1, 2006) App.39a. *But see*, *Quinn v. City of Boston*, 325 F. 3d 18, 37 (1st Cir. 2003) ("After all, a public employer who consents to the use of race as a factor in order to palliate the lingering effects of past discrimination must maintain continuous oversight in order to ensure that the decree works the least possible harm to other innocent persons competing for employment. Bakke, 438 U.S. at 308, 98 S.Ct. 2733.")

A. Proceedings Below

In October 1972, litigation began between the Shield Club, the City of Cleveland, and the Fraternal Order of Police in which the Shield Club sued the City for racial discrimination adversely affecting the hiring and promoting of African-American police officers in the Cleveland Police Department. In December 1972, the District Court ordered that based on the number of minorities who passed the 1972 civil service test, "at least 18% (plus or minus one per cent) of the 188 policemen appointed, shall be black or Hispanics." *Shield Club v. City of Cleveland*, 5 EPD Para. 8406 at pg. 7030 (December 21, 1972). On November 11, 1977, the

District Court approved a consent decree governing the hiring and promotion practices of the police department.

Subsequently, on December 21, 1984, the District Court amended the consent decree. ("ACD"). The 1984 ACD only governed the hiring practices of the Cleveland Police Department. By its terms, the ACD would expire either when 33% of the department were minority officers or on December 31, 1992, whichever occurred first. However, for any year that the City did not hire a minimum of seventy officers, the life of the decree would be automatically extended by an additional year unless the City had already achieved the 33% level.

It is this 1984 ACD and its application by the City of Cleveland to the 1992 civil service eligibility list which has been challenged by the Petitioners in this litigation. The challenge is to the constitutionality of the decree as applied to the class between 1992 and 1994.

This action was filed in 1994 by a class of non-minority applicants from the May 18, 1992 civil service eligibility list for the position of police officer for the City of Cleveland. The class filed with their initial complaint a Motion for a Temporary Restraining Order and for a Preliminary Injunction against the City of Cleveland which was denied by the District Court. The class then filed an Amended Complaint that set forth five causes of action: (1) violations of 42 U.S.C. §§ 1981, 1983, and the Equal Protection Clause of the Fourteenth Amendment; (2) violations of § 1983 and the Due Process Clause of the Fourteenth Amendment to the Constitution; (3) violations of § 1985(3) and the Equal Protection and Due Process Clauses; (4) violation of Title VII of the Civil Rights Act of 1964, 42

U.S.C. § 2000e; and (5) violation of Ohio's common law of fraud.

The District Court certified this litigation as a class action comprised of two sub-classes of non-minority applicants from the May 18, 1992 eligibility list. Sub-class A was comprised of applicants who alleged that as a result of the City's hiring pursuant to the 1984 ACD, they were not hired for the position of police officer even though minority candidates who ranked lower than they did on the May 18, 1992 eligibility list were considered and selected for that position. A second Sub-class B was also certified, but the District Court subsequently decertified this subclass and it is not an issue being raised by this petition.

The District Court granted summary judgment against the class based on *Rafferty v. City of Youngstown*, 54 F.3d 278 (6th Cir.), *cert. denied*, 516 U.S. 931, 133 L. Ed. 2d 236, 116 S. Ct. 338 (1995), holding that the case law and statute foreclosed any constitutional challenge to the City's hiring practices under the 1984 ACD. The class appealed this dismissal and the Sixth Circuit Court of Appeals reversed and remanded the case. *Rutherford v. City of Cleveland*, 137 F.3d 905 (6th Cir. 1998).

After the remand, the District Court permitted the parties to conduct discovery regarding the outstanding issues. The parties filed cross motions for partial Summary Judgment on the challenge to the constitutionality of the hiring from the May 18, 1992 eligibility list based on the 1984 ACD. The Court ruled on October 12, 2000 that the hiring from the May 18, 1992 eligibility list using a racial quota was both constitutional and in accord with federal statutory law. *Rutherford v City of Cleveland* Case No. 94

CV 1019 (N.D. Ohio October 12, 2000) Appendix at App. 41a. It is this decision and the subsequent Sixth Circuit Court of Appeals Decision in *Rutherford v City of Cleveland* Case No. 04-3904 (6th Cir. June 1, 2006) App. 1a. affirming the constitutionality of the ACD which are the basis for this challenge.

B. Facts

On the 1992 civil service eligibility list, there were 554 minority applicants out of 1839 persons or 30.1% of all eligible applicants. Out of these 554, a total of 504 minority candidates were considered for the position of police officer by the City. The last non-minority hired from the 1992 Eligibility List was ranked number 455. The last minority hired was ranked number 1370.

The reason that over nine hundred applicants separated the last hired from each racial group was that the City used the ACD to give a racial preference in selecting minority candidates for police officer. Under the 1984 ACD, the City was required to "hire no less than three minority police patrol officers for every four non-minority police patrol officers." This represents a mandated percentage of 42.8% of all hires to be minorities.

The ACD was set to expire either when 33% of the police department were minority officers or on December 31, 1992, whichever occurred first. However, for any year that the City did not hire a minimum of seventy officers, the life of the decree would be automatically extended by an additional year. Regarding the number of police officers hired from 1985 through 1992 there was a total of 677 for an average per year of 84.62.

Petitioners timely brought this litigation after being subjected to the racial quota selection procedures of the ACD after its terms were automatically extended two additional years[1] merely because the inflexible minimum hiring target provision of 70 police officers per year was not achieved in 1986 and 1991. It is interesting to note that the hiring target was missed by only six in 1991, the year before the ACD was scheduled to terminate. This decision, upholding this affirmative action racial selection mandate that lasted twenty-two years, is in conflict with a number of other Courts of Appeals: *Dean v. City of Shreveport,* 438 F.3d 448 (5th Cir 2006); *Quinn v. City of Boston,* 325 F.3d 18 (1st Cir. 2003); *In re Birmingham Reverse Employment Discrimination Litigation*, 20 F.3d 1525 (11th Cir. 1994) and *Maryland Troopers Assoc. v. Evans,* 993 F.2d 1072 (4th Cir. 1993).

The application of the 1984 ACD to the relevant hiring in 1993 and 1994 cannot meet the strict scrutiny analysis in an Equal Protection challenge. *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986). There was no "compelling interest" in maintaining a racial quota after the Decree was supposed to sunset in 1992. None of the victims of the racial discrimination allegedly being practiced by the City in early 1970's were still being assisted by this preferential treatment. Further, the test selection procedures had been validated to avoid unfair discrimination for the previous eighteen years. The record in this case is devoid of evidence of anything but a remote history of discrimination in

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1 If the ACD had terminated at the end of 1992, none of the named plaintiffs or class members would have been subjected to race-based relief because the City did not make the first appointment from the 1992 Eligible List until 2/1/93.

the hiring of police officers by the City of Cleveland. Indeed, there was never any finding of intentional racial discrimination by the Court regarding the Cleveland Police Department even in the 1977 original Consent Decree.

Because "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification,"*Gratz v. Bollinger*, 539 U.S. 244, 270 (2003), the City bears the burden of demonstrating that its use of a racial quota after two decades of relief is narrowly-tailored to further that compelling interest of remedying past effects or current discrimination. A burden it cannot meet.

Nor can it meet the other prongs of the strict scrutiny analysis. *United States v. Paradise*, 480 U.S. 149, 171 (1987). By 1992, the 1984 Amended Consent Decree could not meet any of the five factors to be considered in the determination of this second prong of the strict scrutiny test: 1) the relationship of the numerical goals to the relevant labor market, 2) the efficacy of alternative, race-neutral remedies and the classification's necessity, 3) the duration, 4) the classification's burden on non-minorities, and 5) the flexibility of the numerical goals. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995)

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case to decide the limits of affirmative action in the context of employment by state and local governments. The reason for applying strict scrutiny is the recognition that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine

of equality.' " *Shaw v. Reno,* 509 U.S. 630, 643 (1993) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100(1943)). This Court has made clear that racial classifications, whatever the motivation for enacting them, are highly suspect and rarely withstand constitutional scrutiny. "[T]he basic principle is straightforward: 'Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.' " *Miller v. Johnson*, 515 U.S. 900, 904, 115 (1995) (citation omitted).

The imposition of a racial mandated quota in selection of police officers for over two decades when no finding of intentional discrimination was ever made is counterproductive to the principles of racial equality and the rule of law. As Justice O'Connor, joined by Chief Justice Rehnquist and Justices White and Kennedy in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) observed "[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." Justice Scalia concurred in the judgment, arguing that racial classifications must be restricted even more narrowly: "[a]t least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb--for example, a prison race riot, requiring temporary segregation of inmates--can justify an exception to the principle embodied in the Fourteenth Amendment that our Constitution is colorblind, and neither knows nor tolerates classes among citizens ...." *Id.* at 521 (citations omitted)

This Court is presently facing similar issues involving affirmative action and its constitutional limits in the context of public schools in *Parents Involved in Community Schools*

v. Seattle School Dist. No. 1, 126 S.Ct. 2351 (Mem), 165 L.Ed.2d 277 (2006). The court's opinion in this case is being closely watched and no doubt both litigants and the lower courts will attempt to apply the principles established into matters relating to employment. This case provides a vehicle to answer these important questions and give guidance to applying it to existing court-imposed Consent Decrees in public employment matters. This will promote judicial economy and the development of uniform standards throughout the circuits.

Further, the Sixth Circuit's decision creates a direct conflict with decisions of at least four other circuits requiring this Court to give constitutional guidance to resolve this serious split. The Sixth Circuit approved the City of Cleveland's engaging in race-based quotas without the need of showing that there still existed past effects or current discrimination as required by the *City of Richmond v. J.A. Croson Co.*, 488 U.S. at 507. This litigation provides this Court an opportunity to gauge the constitutional boundaries to limit the need for future litigation on this important question facing the lower courts.

1. The Court Should Decide Whether the Automatic Extending of Racial Quotas for Additional Two Years in Hiring Police Officers without a Showing of a "Compelling Interest" based on Contemporaneous Racial Discrimination violates the United States Constitution.

Forged in the crucible of Reconstruction and "[p]urchased at the price of immeasurable human suffering," *Adarand Const., Inc. v. Peña*, 515 U.S. 200, 240 (1995)

(Thomas, J., concurring), the Equal Protection Clause of the Fourteenth Amendment mandates that "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "Because the Fourteenth Amendment 'protects persons, not groups,' all governmental action based on race--a group classification long recognized as in most circumstances irrelevant and therefore prohibited--should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (quoting *Adarand*, 515 U.S. at 227, 115 S.Ct. 2097 (1995) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943)).

The Sixth Circuit decision did not place the burden on the City that it had a compelling interest and that the remedy was narrowly tailored as required by this Court's decision in *Gratz v. Bollinger* 539 U.S. 244, 270 (2003)[2] The City failed to adduce any evidence when the ACD was extended that there was any compelling reason in 1992 two decades after the District Court first imposed a racial quota on hiring that it was still constitutionally required to operate these unfair selection procedures. *Dean v. City of Shreveport,* 438 F.3d at 456-57 (5th Cir 2006) ("If the effects of past discrimination no longer existed when Appellants were denied employment, the City no longer had a compelling interest to justify a

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2. "Even if the ultimate burden of proof were to be placed on the City defendants, we find that they have provided sufficient evidence to meet this burden. Thus, we leave to another day the question of whether parties challenging a remedial race-based plan bear the ultimate burden of proof (as do most parties challenging government action) or rather that burden should be placed on the government-defendants given the important equal protection issues involved." *Rutherford v. City of Cleveland* Case No. 04-3904 (6th Cir. June 1, 2006) App. 14a n5.

race-conscious remedy").

It cannot be disputed that no evidence was submitted by the City prior to the automatic two-year extension of the ACD. The only evidence that existed to meet this obligation of showing a compelling need related to evidence from hearings in 1977 and 1984. This historical review begs the question of whether in 1993 and 1994 could the imposition of racial quotas by the City be constitutionally justified.

In fact, the record in this case is devoid of evidence of anything but a remote history of discrimination in the hiring of police officers by the City of Cleveland. Indeed, there was never any finding of intentional racial discrimination by the City. In 1972, the District Court specifically noted the lack of evidence of intentional discrimination:

> **It is not shown that the racially discriminatory impact of the tests is intentional.** On the contrary, the Civil Service Commission President testified: 'My entire goal was to get the kind of test that would not keep out minority people.' . . .The court concluded and now reaffirms that **because it has not yet been demonstrated that the tests included in the examination are job related**, the defendants have failed to overcome the prima facie showing. *Shield Club v. City of Cleveland*, 5 EPD Para. 8406 at 7028 (December 21, 1972) [emphasis added].

Reviewing the progress of the City in affirmative hiring efforts, the District Court in 1984 when approving the ACD again found no evidence of intentional discrimination

by the City: "The evidence in this hearing and this court's first-hand knowledge of the operation of the consent decree convinces the court that the shortfall in reaching the affirmative action goal of 35.8% minority officers is directly related to fluctuating municipal finances . . . **The evidence indicates and the court finds that the City of Cleveland continues to exercise good faith in carrying out the consent decree** *Shield Club v. City of Cleveland Case* No.72-1088, C-77-346 Slip Op at 8-9 (February 22, 1984)[emphasis added].

Given such good faith and lacking any more recent evidence of discrimination, the extension of the 1984 Consent Decree possibly was not justified. Certainly such evidence cannot be used to justify racial quotas in 1992 and beyond. Petitioners respectfully disagree with the Sixth Circuit conclusion and based on the dictates of *Grutz* argue that a finding of unconstitutionality in this matter would be required since no evidence was adduced to support the ACD in 1992 when it was automatically extend or at the TRO hearing in 1994. The lack of such evidence is not adequate to meet the constitutionally mandated "most exact connection between justification and [racial] classification," *Fullilove v. Klutznick,* 448 U.S. 448, 537(1980).

2. The Court Should Decide Whether a Consent Decree which Permits an Automatic Extension of its Terms is not "Narrowly Tailored" in Relationship to the Numerical Goals of the Relevant Labor Market in Violation the United States Constitution

As of 1992 the numerical quota was totally out of

balance with the qualified labor pool. The 1984 Amended Decree's inflexible three "Minority" officers for every four "White" officers meant that almost 43% of new police applicants would be selected by a racial quota. During the same time, the relevant labor pool was *only* 30.6% since only 554 applicants from the eligibility list were "Minority."

The Sixth Circuit decision affirmed the constitutionality of using this rigid racial quota system. *Rutherford v. City of Cleveland* Case No. 04-3904 (6th Cir. June 1, 2006) App. 31a-32a. Compare with *In re Birmingham Reverse Employment Discrimination Litigation*, 20 F.3d 1525, 1548 (11th Cir. 1994) ("The City's rigid approach [50% of all promotions to minority candidates], while administratively convenient, is not a narrowly tailored means to remedy prior discrimination. It is instead an approach designed to achieve government-mandated racial balancing--the perpetuation of discrimination by government. We can imagine nothing less conducive to eliminating the vestiges of past discrimination than a government separating its employees into two categories, black and non-black, and allocating a rigid, inflexible number of promotions to each group, year in and year out. We conclude that the City's use of race in its affirmative action plan is not narrowly tailored to achieve a compelling government interest. Instead, it provides for "blind hiring by the numbers ... amount[ing] to a rigid and impermissible quota system." *Howard,* 871 F.2d at 1009.")

In *Croson*, this Court "recognized that for certain entry level positions or positions requiring minimal training, statistical comparisons of the racial composition of an employer's work force to the racial composition of the relevant population may be probative of a pattern of

discrimination." *City of Richmond v. J.A. Croson Co.*, 488 U.S. at 501. This Court reiterated, however, that "when special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.* (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.13).

The 1977 Consent Decree states in item 12(a) that: The [City of Cleveland] shall establish an appropriate minority hiring goal...of 35.8% adopted by the City's 1977 "Affirmative Action Plan" and based upon external labor market figures contained in the 1970 census. *Shield Club v. City of Cleveland* Case No.72-1088, C-77-346 1977.

The 1984 ACD provides that the Decree shall remain in effect "until such time as 33% of the police officers employed by the City are minorities or until December 31, 1992." *Shield Club v. City of Cleveland* Case No.72-1088, C-77-346 1984 Consent Decree.

The 1977 Consent Decree cites the raw labor market figures contained in the 1970 census, rather than relying upon statistics which reflect the actual qualified labor market. The best evidence of the actual labor market is applicant flow data. The City of Cleveland maintained such applicant flow data, which is summarized in the Final Report on the Development and Administration of the 1992 Entry Level Police Examination for the City of Cleveland by N.D. Henderson, Ph.D. at page 42. On the 1992 test, 2035 "White" applicants and 1498 "Minority" applicants took the test. *Id.* Of the individuals that took the test, 1257 "White" applicants received qualifying scores, and 554 "Minority" applicants

received qualifying scores. *Id.* Thus, 1257 "White" applicants and 554 "Minority" applicants were qualified applicants, and thus represent the relevant labor market for the Cleveland Police Department for 1992. *Id.* The comparison of the 1257 "White" applicants and 554 "Minority" applicants reveals that 30.6% of the qualified applicants were "Minority." *Id.* In contrast, the 1984 Amended Consent Decree in effect in 1992 requires a hiring quota of 42.8% "Minority."

The 1984 Amended Consent Decree fails to take into account any of the "winnowing factors" cited in *Hazelwood School Dist. v. United States*, 433 U.S. at 308 n.13 (1977) These factors would be any of the criteria that the Cleveland Police Department set as the qualifications for Police Officer, including age, education, and background factors such as having no felony convictions. Other factors include applicant interest in the job and willingness to relocate to the City of Cleveland for non-resident applicants.

The terms of the 1977 Consent Decree do not define the relevant labor market with clarity. Instead, the 1977 Consent Decree merely alludes to labor market figures from the 1970 census. This labor market is obviously overbroad, as it fails to take into account basic requirements such as age and education. In addition, a geographic area is not specified. Although Petitioners do not challenge the 1977 Consent Decree, the analysis of the labor market used therein is relevant because the 1984 ACD accepts without question the numbers used in the 1977 Consent Decree. The 1984 ACD does not even address the relevant labor market. Rather, it simply incorporates without question the 33% goal derived from the 1970 census. Thus, fourteen years of applicant flow data are simply ignored. The City cannot meet its burden of

production by referring generically to labor market figures from the 1970 census as justification for extending the ACD in 1992.

3. The Court Should Decide Whether a Consent Decree which Permits an Automatic Extension of its Terms is not "Narrowly Tailored" as Required by the United States Constitution When It Extended its Racial Quota Even Though There had been Eighteen Years of Job Related and Validated Civil Service Tests.

This Court in *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986) explained that:

> The term "narrowly tailored," so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used.... The classification at issue must "fit" with greater precision than any alternative means.

Id. at 279 n.6. The use of validated non-discriminatory testing procedures might be an acceptable alternative to race-based relief. The City had not validated its 1972 test when the original Shield Club litigation was brought against the City. This factor and the statistical disparity between African-American Cleveland police officers and the race of the residents of the City of Cleveland formed the basis for the imposition of the racial quotas challenged in this case. *Rutherford v. City of Cleveland* Case No. 04-3904 (6th Cir.

June 1, 2006) App. 3a-4a. However, ten years prior to the 1984 ACD, this deficiency had been corrected by the City. In 1974, the City of Cleveland constructed a new examination for police officer which was validated for job relatedness and, as the District Court found, was ". . . as free as possible from any cultural racial bias, pursuant to the order of ...[the] court entered on December 21, 1972. *Shield Club v. City of Cleveland*, 8 EPD Para. 9614 at 5635 (September 6, 1974) Nor should the bare fact of a statistical disparity between the race of the workforce and a municipality's population be sufficient to justify twenty-two years of racial quotas. *Maryland Troopers Assoc. v. Evans*, 993 F.2d 1072, 1074 (4th Cir. 1993)("We think that bare statistical comparisons constitute a treacherous rationale for the installation of race preferences, and that the comparisons adduced in this case fall far short of justifying a state-imposed, race-conscious remedy.")

The Sixth Circuit decision rejected the effectiveness of this alternative explaining "[i]n this case, however, the job-validated examinations and screening procedures were not effectively remedying the effects of past discrimination at the time the City entered the ACD. Although the patrol officer examination was validated in 1974, by 1984 the City's proportion of minority officers had only reached 20.8%. The 3:4 hiring ratio simply sped up the City's progress towards achieving its goal of a police workforce made up of 33% minority officers." *Rutherford v. City of Cleveland,* Case No. 04-3904 (6th Cir. June 1, 2006) App. 22a. *But see, In re Birmingham Reverse Employment Discrimination Litigation*, 20 F.3d 1525, 1548-49 (11th Cir. 1994); *See also, Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620 (1974) ("But the simplistic percentage comparisons... lack real meaning in the context of this case.... [T]his is not a

case in which it can be assumed that all citizens are fungible for purposes of determining whether members of a particular class have been unlawfully excluded").

This analysis presumes that the constitutionally deficient 33% racial quota was valid. Given such good faith and lacking any more recent evidence of discrimination, the extension of the ACD was not justified. All written entrance examinations for Cleveland Police Officers, beginning with the February 23, 1974 entrance examination through the 1992 entrance examination, were validated for job relatedness.

Sometime after Cleveland began using a validated test, it was not necessary to use race–based relief. The City admits that it had been using written entrance examinations for Cleveland Police Officers that had been validated for job relatedness for *18* years prior to the 1992 test. Using validated tests for this length of time clearly eliminated the need for race-based relief by 1992.

4. The Court Should Decide Whether a Consent Decree which Permits an Automatic Extension of its Terms is not "Narrowly Tailored" in its Duration as required by the United States Constitution.

The District Court imposed racial quotas in 1972 in hiring of police officers for the City of Cleveland. *Rutherford v. City of Cleveland,* Case No. 04-3904 (6th Cir. June 1, 2006) App. 3a. A formal Consent Decree was entered into in 1977 and the ACD in 1984. *Id.* at 4a. These racial quota's continued based on an automatic 2 year extension until 1995 when the District Court formally dissolved the ACD some

twenty-three years later. *Rutherford v. City of Cleveland,* Case No. 94 CV 1019(N.D. Ohio October 12, 2000) Appendix at 56a.

As Judge Roger's Sixth Circuit concurring opinion observed:

> **First, the ACD arguably had been in place too long to be narrowly tailored.** In an affirmative action plan seeking to remedy past discrimination, there are essentially three possible groups that stand to benefit: (1) those actually discriminated against, (2) those not actually discriminated against but who are members of the same group as those discriminated against and who were around at the time the discrimination took place (justifying a limited remedy of, for example, up to 10 years), and (3) other members of that group at any time (as an extreme example, 75 years after the discrimination). **In this case, the minority recruits are mostly members of the third group because few of them would have been old enough to be hired as a police officer when the discrimination took place in the 1970s.**

Rutherford v City of Cleveland Case No. 04-3904 (6th Cir. June 1, 2006) App. 36a. [emphasis added]

The twenty-two year period of racial quotas is simply too long to meet the narrow tailoring requirement under the U.S. Constitution. Whatever evidence of discrimination was too remote to support such affirmative action relief. The approach by the Fifth Circuit in *Dean v. City of Shreveport,*

438 F.3d 448, 461 (5th Cir 2006) provides the proper constitutional standard:

> The durations of the remedies [22 years] in this case are breathtakingly long in comparison to others we have reviewed. *Edwards v. City of Houston*, 78 F.3d 983, 1002 (5th Cir.1996) (en banc), involved a consent decree that allowed a police department to promote a certain number of minority officers to sergeant and lieutenant. The remedy was to last no longer than five years. *Id.* In *Black Fire Fighters Ass'n,* 19 F.3d at 997, we struck down a consent decree that allowed a fire department to promote a certain number of minorities to higher ranking positions. We found the remedy not to be narrowly tailored even though it lasted for only three years. *Id.* Finally, in *Police Ass'n,* 100 F.3d at 1173, we again struck down a race-conscious promotional plan. We found the remedy not to be narrowly tailored even though it was a one-time set of promotions, not an ongoing plan.

Id. at 1169.

5. The Court Should Decide Whether a Consent Decree which Permits an Automatic Extension of its Terms is not "Narrowly Tailored" in the Classification's Burden on Non-Minorities as required by the United States Constitution.

This *Paradise* factor requires the balancing of the impact of the relief on the rights of third parties. Here, the

application of race-based hiring goals to the 1992 Eligible List drastically affected the rights of the class representatives and class members. The dream of many of these individuals was to become a Cleveland Police Officer. Yet, due to the unwarranted extension of the racial quotas in the 1984 ACD for an additional two years, many of the class members were not even considered for the position of Police Officer. There were 78 minority officers appointed from the 1992 Eligible List who ranked below the last non-minority officer appointed from the List.

Class Representatives Janell Rutherford and Richard Dembie both took the 1996 Cleveland Police Officer test and were subsequently hired after the ACD was dissolved by the District Court. However, their seniority rights and opportunities for promotion have been adversely affected by the imposition of the two-year automatic extension of the ACD. Class Representative Kevin Reilly became a police officer in another suburb, but was denied the opportunity to work in the City of Cleveland with his father a long term Cleveland police officer. As for Julie Torres, a single parent who was 85th on the eligibility list, she has never become a police officer. Ms. Torres is one example of many of the class members who have given up their dream of becoming a Cleveland Police Officer and have moved on to other careers. For them, the impact of the race-based relief caused the denial of their dream..

As Judge Roger's Sixth Circuit opinion observed:

> ...the consent decree was open-ended depending on the actions of the City. By continually hiring fewer than seventy police officers per year, the City could have extended the ACD indefinitely.

> A consent decree that permits affirmative action as an ongoing option, rather than as a limited requirement, should not so easily be maintained by relying on the discriminatory situation faced at the time of the original decree. **The reasonableness of the 70-per-year rule in terms of protecting minorities from city evasion of consent decree requirements does not necessarily imply that the rule is narrowly tailored for purposes of protecting the interests of nonminority applicants adversely affected by the decree.**

Rutherford v. City of Cleveland, Case No. 04-3904 (6th Cir. June 1, 2006) App. 37a-38a. [emphasis added]

The combined duration of the 1977 Consent Decree and the 1984 ACD was for a period of seventeen years and six months from November 11, 1977 to May 15, 1995. Race-based hiring quotas were in place for over twenty-two years. There can be no doubt that the extreme length of this remedy significantly and adversely impacted the right of third parties.

6. The Court Should Decide Whether a Consent Decree which Permits an Automatic Extension of its Terms is not "Narrowly Tailored" in the flexibility of the Numerical Goals as Required by the United States Constitution.

The 1984 ACD did not have any meaningful waiver provisions in the event that the pool of qualified "Minority" applicants was low for any given year. In fact it contains a provision that specifically provides that "[s]hould the [City of

Cleveland] exhaust the pool of qualified minority applicants from any given list, the [City] shall administer new entrance examinations and shall prepare new eligible list."

In 1992, the City of Cleveland had an African-American Mayor, Police Chief, Safety Director and City Council Safety Committee Chair. During the two year extension of the racial quotas under the ACD, the City of Cleveland considered 504 of the 554 minority applicants on the 1992 eligibility list. Because of the ACD, the City hired minorities who ranked nine hundred positions lower than the last non-minority hired. As the Fourth Circuit warned "[a]ll too easily, invidious racial preferences can wear the mask of remedial measures--a risk that only magnifies as the governmental body gets smaller and more susceptible to interest-group capture." *Maryland Troopers Assoc. v. Evans,* 993 F.2d 1072, 1076 (4th Cir. 1993).

As a result of the ACD, unqualified minority applicants were hired off the 1992 eligibility list. The Petitioners expert, Dr. Bryan Pesta, prepared a report and attachments showing examples of minority candidates who were hired in spite of not even being minimally qualified for the job based upon the background checks and other allegedly nondiscriminatory selection procedures. Dr. Pesta, in his report, that was never rebutted, made a series of findings including that the minorities hired had such negatives "that I would have no problem rejecting, were I the safety director." Applying these standards his report gave the following examples of minority applicants hired by the City of Cleveland from the 1992 eligibility list:

> Minority # 77, while employed as a police officer at another municipality , had

placed his service revolver at his girlfriend's head and threatened to kill her. He later threatened to kill himself. Reports indicated that the applicant had a temper, though his MMPI-2 information is missing. Applicant's employment history showed that he was terminated from his position as store detective for Marc Glassman, Inc. The applicants file also revealed four traffic violations and two incidents in the police record. The applicant graduated 363rd in a class of 370, with a GPA of 1.202 and had been tardy 57 days in his senior year.

Minority # 48 reported a voluntary departure from Stouffer's Hotel, but the interview with the former employer revealed that the applicant was in fact terminated for failing to report his involvement in an accident while driving the employer's vehicle. Applicant also reported that he quit Reliable Runners, though he was fired due to a vehicle problem. The police record revealed drunken and disorderly conduct charges. Initially, the applicant was rejected for a composite of unsuitable characteristics, notably the police record, accident record, and employment record. Applicant was reinstated by the Civil Service Commission and subsequently hired.

Minority applicant # 31 had four traffic violations, though he reported only two. These included a reckless operation in 1992. He also had a domestic violence charge and a juvenile violation, neither of which were reported. An

interview with a neighbor noted that applicant had a quick temper, and the police records indicated that applicant was charged with simple assault in November of 1992.

Minority applicant # 45 reported two traffic violations, though his record revealed four. The two reported and the four revealed were all different, thus showing a total of six traffic violations, in addition to a warrant issued in December of 1992 and a six point warning letter in 1990. The MMPI-2 screening report showed that the applicant may not deal with anger effectively if provoked, and may have problems with somatic distress. The City was also notified by an anonymous caller that the applicant sold drugs every evening in a playground.

Minority applicant # 23 had three traffic accidents and police record showed an attempted vandalism charge. Applicant also had six traffic violations, one of which was not reported by him. The unreported violation was a 1992 DUI charge, and the court record of the November 10, 1992 guilty plea is contained within the applicant file. In December of 1992, applicant received a six point warning letter. He was not recommended until Carolyn Allen, the Public Safety Director, intervened.

Using this evidence, the impact of the ACD is apparent since the City instead of undertaking a new test chose to select minority applicants who ranked up to nine

hundred spots lower on the eligibility list than the last non-minority hired. Selection of these applicants not only injured the class members, but residents of Cleveland suffered by the quality of new police officers hired under the ACD.

In addition to the lack of any meaningful waiver provisions, the 1984 ACD was inflexible in other ways. The 1984 ACD requires that 70 persons be hired per year or that year would not be considered towards achieving the goals of the Decree, regardless of the number of minorities hired and regardless of the City's operational needs. This provision fails to take into account that other years were well above the 70 person hiring requirement. Indeed, the average hiring per year for the time period 1985 through 1992 was 84.62 police police officers per year. Therefore, the City of Cleveland hired more officers (and therefore more minorities) than the minimum required per year by the ACD, yet the Decree continued for an additional two years. This lack of flexibility was arbitrary in its effect as it bore no relationship to any legitimate minority hiring goals. *U.S. v. Paradise,* 480 U.S. at 177-78 The 1984 ACD had no provision to account for the natural fluctuations in the City of Cleveland's budget and operational needs. Thus, it was not narrowly tailored as constitutionally required.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Case No. 04-3904

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JANELL RUTHERFORD et al.,	)	
	)	
Plaintiffs-Appellants,	)	ON APPEAL FROM
	)	THE UNITED STATES
v.	)	DISTRICT COURT FOR
	)	THE NORTHERN
CITY OF CLEVELAND et al.,	)	DISTRICT OF OHIO
	)	
Defendants-Appellees.	)	**OPINION**

BEFORE: MOORE, ROGERS, and McKEAGUE, Circuit Judges.

McKEAGUE, Circuit Judge. Appellants, non-minority applicants for the position of police patrol officer in Cleveland, Ohio (the "City"), filed claims of reverse discrimination and disparate treatment against the City, the Cleveland Police Department ("CPD"), and several other City defendants (collectively, the "City defendants"). Appellants' claims relate to two earlier lawsuits involving the City's past discrimination against African-Americans and Hispanics (collectively, "minorities") in hiring and promoting by the CPD. The district court approved in those cases a consent decree that implemented a race-based plan to advance the hiring and promotion of minority police patrol officers.

In the proceedings below, the City defendants were granted summary judgment. Appellants sought review, asking this court to reverse. As explained below, we affirm the district court's judgment. On Appellant's reverse discrimination claim, the City's history of racial discrimination against minorities – as evidenced by its own admission of discrimination, judicial findings, and statistical disparities – provided the City defendants with a compelling interest in implementing the CPD's temporary race-based hiring plan. Given several important features of the plan, especially its sunset provision and flexibility, we also find that the plan was narrowly tailored, and thus survives the strict judicial scrutiny required by the Supreme Court's equal protection jurisprudence. On Appellants' disparate treatment claim, we affirm the district court's finding that the claims are without sufficient support in the record.

I. BACKGROUND

A. The *Shield Club* Lawsuits and Resulting Consent Decree

Although the Appellants do not, strictly speaking, contest the constitutionality of the consent decree except as it applied to them in 1993-1994, their claims necessarily take aim at several of its foundations. Thus, we must review the historical record supporting the consent decree. Appellants take issue only with the hiring practices of the CPD, and not its promoting practices; accordingly, only the evidence involving the CPD's hiring history will be reviewed, unless otherwise noted.

In 1966, minorities constituted 6.2% of the CPD police force. In 1972, that figure had risen to 8.1%. In comparison, the minorities made up approximately 40% of the City's population according to 1970 census figures. The

Shield Club, an organization comprised of minority police officers who represented the interests of minority officers and applicants, filed a lawsuit against the City, the CPD, and other defendants alleging racial discrimination in the hiring and promoting of minority police patrol officers.[1]

As one of their claims, the *Shield Club*-plaintiffs maintained that the CPD's entrance examination discriminated against minorities. The district court agreed, finding that the high failure rate of minorities compared to the much lower failure rate of non-minorities supported plaintiffs' *prima facie* case of discrimination. *Shield Club v. City of Cleveland*, 370 F. Supp. 251, 253 (N.D. Ohio 1972). The district court also found that the examinations were not validated for job performance. *Id.* Faced with this evidence and no effective rebuttal by defendants, the district court concluded that the examinations had a racially discriminatory impact. *Id.* at 254. The district court's conclusion was buttressed by the historical workforce disparities between minorities and non-minorities. *See id.* at 255.

As a result, the district court directed the CPD to appoint minorities at a rate no less than 18% of its incoming police patrol officers. *Id.* The 18% rate was equal to the percentage of examination passers who were minorities. *Id.* at 254. In response to the deficiencies in the examination, the district court directed the defendants to create an examination that was job-related. *Id.* at 256.

Two years later, the district court found that the CPD's screening procedures used to determine which applicants, of those who passed the entrance examination,

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[1] The *Shield Club*-plaintiffs filed a subsequent lawsuit against City defendants. The two cases – Nos. C72-1088 and C77-346 – were consolidated.

could be appointed as officers had a racially disparate impact on minorities. *Shield Club v. City of Cleveland,* No. C 72-1088, 1974 WL 223, at *2 (N.D. Ohio July 6, 1974). The court ordered defendants to develop and implement racially-neutral screening procedures. *Id.* at *3. Faced, however, with a serious shortfall of officers and without racially-neutral selection procedures available, the district court also directed the City to hire a specific percentage of minorities as officers. In determining the target, the district court noted that of the 400 highest ranking applicants based on the 1974 examination, approximately 39.5% were minorities. The court therefore instructed the City that if a significant departure in officer hiring (more than 2% to 3% below 39%) developed, it would take another look at whether the City was engaging in racial discrimination. *Id.* at *3.

In 1976, the district court determined that the Chief of Police had a racially discriminatory purpose in perpetuating under-representation of minorities in certain minority-dominated districts of the City. *Shield Club v. City of Cleveland,* No. C72-1088, 1976 WL 736, at *12 (N.D. Ohio Oct. 20, 1976). The court specifically found a "continuing marked under-representation" of minorities in these districts, without any explanation or justification by the defendants. *Id.*

Subsequently in 1977, the parties submitted a consent decree to the district court. The parties entered into the decree to "effectuate an effective prospective remedy designed to eliminate all vestiges of race discrimination within the City of Cleveland Police Department." Consent Decree ¶ 1, JA at 586. As to minority officer hiring, the parties stipulated that the CPD would utilize "only such selection criteria . . . as are non-discriminatory and demonstrably job-related." *Id.* ¶ 9, JA at 588. They established a minority-hiring target of not less than 35.8%, a figure "based upon external labor market figures contained

in the 1970 census." *Id.* ¶ 12(a), JA at 589. In order to accomplish this target, the CPD agreed temporarily to hire no less than three minorities for every four non-minority hires (the "3:4 hiring ratio"). *Id.* ¶ 12(c), JA at 589.

According to its charter, the City did not employ a pure "examination rank order" system for hiring officers. Rather, it used what is called the "one-in-three" rule (the "1:3 rule"), which gave the CPD discretion in selecting one candidate from a group of three qualified candidates. Those candidates not appointed on the first review remained on the list in their rank order and were considered again, along with the next highest-ranking candidate, for the next available opening. If a candidate had been certified and not chosen on four separate occasions, that person was removed from the eligibility list. The consent decree permitted the CPD to continue to use the 1:3 rule, *id.* ¶ 10, JA at 588; however, to ensure race played a minimal role in hiring, but also that the 3:4 hiring ratio was met, the CPD could maintain separate lists of qualified minority and non-minority candidates, *id.* ¶ 12(c)(5), JA at 590. Qualified minorities were compared against each other, qualified non-minorities were compared against each other, but minorities were not compared against non-minorities.

The district court held a hearing to determine whether to approve the consent decree. The court specifically addressed whether the *Shield Club*-plaintiffs had proven their claim of a historic pattern of racial discrimination. While the court had earlier determined that the record had not convinced it that the *Shield Club*-plaintiffs had carried their burden, it noted during the approval hearing that this finding was "not engraved in stone." JA at 959. The district court specifically focused on Paragraph 3 of the consent decree. In that paragraph, the parties agreed that the "entire record" reflected a "history of race discrimination in the hiring practices and in the promotion practices" of the CPD. *Id.* In

light of this admission by the defendants, the district court found it unnecessary to hold additional proceedings "to go all through what evidence was spread on this record for five years." JA at 960. The district court concluded that the record was sufficient to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated," accepting as fact the defendants' admission of racial discrimination. *Id.* At 961 (quoting *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975)). The district court placed its imprimatur on the consent decree in November 1977. At the time, minorities made up 9.2% of the City's police officers.[2]

Near the end of 1984, the *Shield Club*-plaintiffs sought to modify and extend the consent decree. By this time, minorities made up 20.8% of the CPD police force. The defendants initially opposed such modification and extension. The district court determined that the defendants had met their obligations as to promotions, but that there remained a question of fact on whether the decree should be modified and extended as to officer hiring. The parties then submitted an Amended Consent Decree (the "ACD") dealing

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[2] Subsequent to the entry of the consent decree in the *Shield Club* cases, the City admitted to a pattern of racial discrimination in its fire department. The Vanguards of Cleveland, an organization of African-American and Hispanic firefighters, brought similar claims against the City as those presented in the *Shield Club* cases. The City likewise entered into a consent decree in that case, which was contested and upheld. *See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013 (6th Cir. 1994). As the Supreme Court characterized the City's position, the City decided to negotiate with the Vanguards rather than engage in "another round of futile litigation." *Int'l Ass'n of Firefighters*, 478 U.S. at 506.

solely with CPD hiring practices. Upon review of the decree, the district court approved it.

The ACD expressed the parties' intent to "finally and fully resolve these actions so as to preclude any further requests for extensions and/or modification." ACD Preamble, JA at 856. The decree again provided that the defendants would use "only such selection criteria . . . as are non-discriminatory and demonstrably job related" and that the CPD would continue to use the 1:3 rule. *Id.* ¶¶ 2-3, JA at 857.

> Specifically, as to minority hiring, the ACD required the following:
>
> Temporarily and until such time as 33% of the police officers employed by the City are minorities or until December 31, 1992 (eight years), whichever time or event occurs first, defendants shall hire no less than three minority police patrol officers for every four non-minority police patrol officers, ...

Id. ¶ 4(a), JA at 858. In the event the CPD failed to hire a minimum of 70 patrol officers in any year during the eight-year period, the 3:4 hiring ratio would continue "in full force and effect for one additional year for each year in which the City shall fail to hire the minimum number of police patrol officers, unless the City has otherwise achieved the 33% level." *Id.* ¶ 4(b), JA at 859. The decree permitted the CPD to use separate eligibility lists for non-minority candidates in conjunction with the 1:3 rule. *Id.* ¶ 4(a)(5), JA at 859.

Throughout the eight-year period, the CPD never reached the target of a 33% minority police force. Moreover, the CPD failed to hire at least 70 police patrol officers in 1986 and 1991. Accordingly, the CPD was bound under the ACD to continue using the 3:4 hiring ratio until the earlier of

December 31, 1994, or the date when minorities made up 33% of the police force. The CPD indeed met the 33% target in mid-1994, so the district court concluded that the defendants had fully complied with the requirements of the decree on that date and that the decree expired under its own terms.

B. Appellants' Present Lawsuit

Appellants filed their lawsuit in May 1994, shortly before the ACD expired. Appellants are non-minority applicants for the position of police patrol officer with the CPD. A portion of them comprise a sub-class of applicants who allege that as a result of the ACD's extension into 1993 and part of 1994, they were never considered for the position even though minority candidates who ranked lower than they did on the eligibility list were considered. The remaining Appellants are individuals who were considered for the position in 1993 and 1994, but were rejected by the CPD based on qualifications that were allegedly not applied to minority applicants who were lower on the eligibility list, but still hired.

Appellants argue that the application of the City's race-based hiring plan, as it was applied in 1993 and 1994, was unconstitutional. Specifically, Appellants claim that the ACD should not have been applied beyond 1992, and that such application resulted in less qualified minority applicants being hired as police patrol officers. They argue that had the parties and district court in the *Shield Club* cases attempted to develop the type of findings required under the constitution, the district court would have found that application of the plan in 1993-1994 was not justified by a compelling government interest, nor was it narrowly tailored to achieve such an interest. Furthermore, Appellants contended that

they received less-favorable treatment than minorities during the candidate review and selection process.

In their amended complaint, Appellants set forth five separate causes of action: (1) racial discrimination in the CPD's selection of police patrol officers in violation of the Civil Rights Act of 1871, 42 U.S.C. §§ 1981 and 1983, and the Equal Protection Clause of the Fourteenth Amendment; (2) loss of property interest in consideration for hire based on examination rank in violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Due Process Clause of the Fourteenth Amendment; (3) civil conspiracy in violation of the Civil Rights Act of 1871, 42 U.S.C. § 1985(3), and the Equal Protection and Due Process Clauses of the Fourteenth Amendment; (4) violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; and (5) violation of Ohio's common law of fraud. On the City defendants' motion, the district court granted them summary judgment, finding that Appellants did not have standing to contest the consent decree or its application. We reversed and remanded to the district court for further proceedings. *Rutherford v. City of Cleveland*, 137 F.3d 905, 911 (6th Cir. 1998).

After engaging in discovery, the parties filed motions for summary judgment. The district court granted summary judgment to the City defendants in two separate decisions. Appellants now seek appellate review on their equal protection and Title VII claims, as well as their disparate treatment claims.[3]

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[3] Appellants conceded below that summary judgment was appropriate on their common-law fraud and civil conspiracy claims. Appellants have not pursued on appeal their loss of property claims related to the CPD police patrol officer positions they were not offered. Accordingly, these claims are not before us on appeal.

II. ANALYSIS

A. Summary Judgment Under Fed. R. Civ. P. 56(c)

We review the factual findings of the district court for clear error, *see Brunet v. City of Columbus*, 1 F.3d 390, 410 (6th Cir. 1993), and its legal conclusions, including whether summary judgment is appropriate, *de novo, see Zambetti v. Cuyahoga Cmty. College*, 314 F.3d 249, 255 (6th Cir. 2002) (citations omitted). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Under Rule 56(c), a fact is material only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Whether a factual issue is genuine requires consideration of the applicable evidentiary standards. *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 451 (6th Cir. 2004).

As the moving parties, the City defendants bear the initial burden of showing that there exists no genuine issue of material fact to litigate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The court reviews the evidence and draws all reasonable inferences in favor of Appellants as the non-moving parties. *Zambetti*, 314 F.3d at 255 (citation omitted). Appellants must show, however, more than a "mere . . . scintilla of evidence" to defeat summary judgment; "there must be evidence on which the jury could reasonably find" in their favor. *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995) (citations omitted). Moreover, if the City defendants carry their burden of proof, the burden then shifts to Appellants to "produce evidence that results in a conflict of material fact" to be resolved by the fact-finder. *Cox v. Kentucky Dep't of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995).

B. Race-Based Classifications Must Survive Strict Judicial Scrutiny

Appellants state that they do not question the constitutionality of the City's race-based hiring plan – embodied in the original consent decree and the ACD – as it was applied prior to 1993. They insist instead that their claims arise from application of the ACD in 1993-1994. Yet, if the City's affirmative action plan was unconstitutional as originally implemented and amended, it is hard to fathom how it could be constitutional in 1993-1994. Conversely, if the plan was constitutional in 1977 and 1984, this would be some support for finding it constitutional as it applied in 1993-1994 (given its automatic sunset provision). Moreover, Appellants repeatedly attack the reasoning and factual record which underpin the original consent decree and the ACD. Thus, while focusing on the ACD as it applied in 1993-1994, we also address issues touching squarely on the basic constitutionality of the original consent decree and ACD.

We review the CPD's hiring decisions, based in part on race, under the Equal Protection Clause of the Fourteenth Amendment.[4] *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986). "The Equal Protection Clause prohibits discrimination by government which either burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference." *Trihealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 788 (6th Cir. 2005). Here, the fundamental right of Appellants "to be treated with equal dignity and respect" by a public employer without reference

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[4] The Equal Protection Clause guarantees that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

to their race was implicated by the City's temporary race-based hiring plan. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

Given this fundamental right of equal protection, it is now beyond question that all racial preferences instituted by a government actor – even those actions sanctioned, like here, under a consent decree – must pass strict judicial scrutiny. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *Croson*, 488 U.S. at 493-94; *United Black Firefighters Ass'n v. City of Akron*, 976 F.2d 999, 1008 (6th Cir. 1992). The race of the challengers to a government's preference system has no bearing on our analysis: "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand*, 515 U.S. at 224; *see also Wygant*, 476 U.S. at 273 ("[T]he level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination.") (citations omitted).

To satisfy strict scrutiny, a race-based remedial plan must be narrowly tailored to accomplish a compelling governmental purpose or interest. *United States v. Paradise*, 480 U.S. 149, 167 (1987). Although a high standard to meet, "[s]trict scrutiny is not 'strict in theory, but fatal in fact.'" *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 237). "When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied." *Id.* at 327.

C. Burdens of Proof

Where a race-based remedy is subject to strict judicial scrutiny, as here, the party defending the remedy bears the initial burden of demonstrating "a strong basis in evidence" that a compelling governmental interest exists which justifies the remedy. *Associated Gen. Contractors of Ohio v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) (citing *Croson*, 488 U.S. at 486-92, 500). This burden has also been referred to as the "convincing evidence" standard. *Wygand*, 476 U.S. at 277; *United Black Firefighters*, 976 F.2d at 1009-10. If the defending party meets its initial burden, then the burden shifts to the party challenging the remedy to prove its unconstitutionality. *Aiken v. City of Memphis*, 37 F.3d 1155, 1162 (6th Cir. 1994); *Brunet*, 1 F.3d at 404-05; *see also Wygant*, 476 U.S. at 277-78.[5]

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[5] There is some dispute on whether the government should instead bear the ultimate burden to prove the constitutionality of its affirmative action plan in all cases. *See, e.g., Concrete Workers of Colo., Inc. v. City & County of Denver, Colo.*, 540 U.S. 1027 (2003) (Scalia, J., dissenting from denial of writ of *certiorari*) (stating that government shall bear ultimate burden of proving constitutionality of race-based affirmative action plan); *Bass v. Bd. Of County Comm'rs*, 256 F.3d 1095, 1116 (11th Cir. 2001) (stating that "Supreme Court precedent governing equal protection claims places the burden on a defendant to prove that an affirmative action plan satisfies strict scrutiny"); *Middleton v. City of Flint*, 92 F.3d 396, 404 (6th Cir. 1996) (stating that city had to "prove" it had a compelling interest and that the remedy was narrowly tailored). The Supreme Court's recent decision in *Gratz v. Bollinger* appears to lend support to this position, at least in the education context. 539 U.S. 244, 270 (2003) ("To withstand our strict scrutiny analysis, respondents must demonstrate that the University's use of race in its current admissions program employs 'narrowly tailored measures that further compelling governmental

D. Compelling Governmental Interest

As we have previously observed, "[t]here is no question that remedying the effects of past discrimination constitutes a compelling governmental interest." *Associated Gen. Contractors*, 214 F.3d at 735 (citing *Croson*, 488 U.S. at 503; *United Black Firefighters*, 976 F.2d at 1010-11). Societal discrimination alone is insufficient, though – the City defendants must make "some showing of prior discrimination" on their part to justify the "limited use of racial classifications in order to remedy such discrimination." *Wygant*, 476 U.S. at 274; *see also Croson*, 488 U.S. at 504 (recognizing a compelling interest in a government's effort to remedy past discrimination for which it is responsible). Thus, if the City defendants come forward with a strong basis in evidence of past discrimination in the hiring policies or practices of the CPD, they will have met their initial burden.

Establishing a strong basis in evidence is not an easy burden to meet. "The only cases found to present the necessary 'compelling interest' sufficient to 'justi[f]y a narrowly tailored race-based remedy' are those that expose . . . 'pervasive, systematic, and obstinate discriminatory conduct.'" *Associated Gen. Contractors*, 214 F.3d at 737 (quoting *Adarand*, 515 U.S. at 237). "[A]n amorphous claim that there has been past discrimination in a particular

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interests.'") (quoting *Adarand*, 515 U.S. at 227). Even if the ultimate burden of proof were to be placed on the City defendants, we find that they have provided sufficient evidence to meet this burden. Thus, we leave to another day the question of whether parties challenging a remedial race-based plan bear the ultimate burden of proof (as do most parties challenging government action) or rather that burden should be placed on the government-defendants given the important equal protection issues involved.

industry" is not enough. *Vogel v. City of Cincinnati*, 959 F.2d 594, 599 (6th Cir. 1992) (quoting *Croson*, 488 U.S. at 499).

To begin, the City's own admission of its history of discrimination against minorities in CPD hiring – a position it fought against in litigation for a number of years – is persuasive evidence of "pervasive, systematic, and obstinate discriminatory conduct." This is not a case in which a government body makes a finding that societal discrimination affects a particular industry, such as in *Croson* and *Adarand*. Nor is this a case in which a government body expressly maintains that it did not engage in unlawful racial discrimination . *See, e.g., Aiken*, 37 F.3d at 1158. This is a case, rather, in which a governmental defendant admits its own culpability – against its own interests at the time – in past racial discrimination. These are critical distinctions. *See Vogel*, 959 F.2d at 600 (recognizing distinction between affirmative action plans based on generalized discrimination in an industry versus discrimination by a city in hiring its own police force).

The City's admission was not simply made in a newspaper article, press release, or in some other voluntary, public forum, but in a consent decree approved by and entered as a judgment of the district court. A race-based hiring plan embodied in a consent decree "stands somewhere in between a voluntary affirmative action program (as in *Wygant*) and a remedial plan that a court has imposed after making a formal finding of intentional discrimination (as in *United States v. Paradise* . . .), for a consent decree is a hybrid that has 'attributes both of contracts and of judicial decrees.'" *Donaghy v. City of Omaha*, 933 F.2d 1448, 1459 (8th Cir. 1991) (quoting *Int'l Ass'n of Firefighters*, 478 U.S. at 519). On the one hand, as a form of "contract founded on the agreement of the parties, . . . [i]t should be construed to preserve the position for which the parties bargained."

Vogel, 959 F.2d at 598 (citations omitted). On the other hand, as a form of judgment, "[w]hile the entry of an affirmative action consent decree does not guarantee that the decree serves a remedial purpose . . . , the heightened judicial oversight inherent in a properly entered decree helps attain that end." *Donaghy*, 933 F.2d at 1459. Here, both aspects – contractual and judicial – weigh in favor of giving real effect to the City's admission of past discrimination.

A party can also demonstrate a strong basis in evidence by showing that a court made a finding of past discrimination. *Wygant*, 476 U.S. at 289; *see also Boston Police Superior Officers Fed'n v. City of Boston*, 147 F.3d 13, 20 (1st Cir. 1998) (explaining that a "strong basis" in evidence can be based on a "contemporaneous or antecedent finding of past discrimination by a court or other competent body") (citations omitted). As recounted above, the district court made several findings of discrimination prior to 1977 against the City. During its review of the consent decree in 1977, the district court concluded that the record supported the City's admission of a history of race discrimination within the CPD. It subsequently reaffirmed this position by entering the ACD as a judgment of the court in 1984.

A review of the statistical evidence also supports the City's admission and the district court's findings of discrimination. While evidence of "mere statistical disparities" is not enough by itself to show a compelling interest, *Associated Gen. Contractors*, 214 F.3d at 736 (citing *Croson*, 488 U.S. at 501-02), a *prima facie* case of discrimination can be made where "a *gross disparity* exists between the expected percentage of minorities selected [for hire] and the actual percentage of minorities selected [for hire]," *United Black Firefighters*, 976 F.2d at 1011 (emphasis added); *see also Croson*, 488 U.S. at 509 (plurality op., O'Connor, J.) (explaining that a *prima facie* case of discrimination can arise "[w]here there is a significant

statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors"); *Aiken*, 37 F.3d at 1163 ("It is settled that *appropriate* statistical evidence setting forth a *prima facie* case of discrimination is sufficient to provide a strong basis in evidence to support a public employer['s] affirmative action plan.") (internal quotations omitted; emphasis in original); *Vogel*, 959 F.2d at 599 ("Evidence of wide statistical disparities . . . may justify an affirmative action policy adopted by a public employer.") (citations omitted).

The record is replete with gross statistical disparities between the treatment of minorities and non-minorities by the CPD. For example, the district court found that in the 1970s, minorities constituted 23% of those taking the entrance examination, but represented 64% of those who failed. Minorities had a failure rate of 26.3% compared to a rate of 4.5% for non-minorities. *Shield Club*, 370 F. Supp. at 253. Throughout the 1970s, 1980s, and early 1990s, the percentage of minorities in the CPD officer force tracked below – often quite significantly – the level of minorities in the general population, the percentage of examination takers who were minorities, and the percentage of examination passers who were minorities. This court has found that similar disparities supported a finding of racial discrimination. *See, e.g., Vogel*, 959 F.2d at 600.

Appellants cite to this court's decision in *Middleton* for support of their position that the statistical disparities do not warrant a finding of compelling interest. That case is distinguishable on a number of important points. First, as the court noted at the very beginning of its analysis, the City of Flint's plan was not presented as part of a motion for a judicially approved consent decree, but rather was voluntarily conceived as part of the normal political process. *Middleton*,

92 F.3d at 401. Thus, there was no heightened judicial review of the plan before its implementation nor any prior judicial findings of discrimination. The city relied upon general population statistics rather than also considering the relevant labor pool. *Id.* at 406-08. The court was further concerned about several serious deficiencies in the city's expert statistical analysis. *Id.* None of these shortfalls exist here.[6]

Appellants also argue that even if there was a compelling interest justifying the race-based remedy in 1977 and 1984, surely there was no such interest in 1993 and 1994. As evidence, they point to the convergence of the CPD's minority police force percentage to the 33% target. Yet, in determining whether the governmental body had a compelling interest, a reviewing court should focus on the evidence of discrimination existing at the time the body enacted the race-based remedy. *See Shaw v. Hunt*, 517 U.S. 899, 910 (1996) (holding that "the institution that makes the racial distinction must have had a strong basis in evidence to conclude that remedial action was necessary, *before* it embarks on an affirmative-action program.") (internal

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[6] This court's decision in *Long v. City of Saginaw* is likewise distinguishable. In that case, we reversed a district court's grant of summary judgment to city officials over an amendment to the city's race-based hiring plan for its police department. 911 F.2d 1192 (6th Cir. 1990). We found that there was no compelling interest for the plan because, in part, there had never been a complaint of discrimination lodged against the city, nor had there been any adjudication or formal findings of discrimination against the city in its hiring of officers. *Id.* at 1197. Without some record of discrimination, we concluded that the city's admission against interest was insufficient by itself to justify the remedial measures. *Id.* at 1198. The city's statistical evidence also suffered from numerous defects which are not present here. *Id.* at 1199-200.

quotation omitted, emphasis in original); *In re City of Memphis*, 293 F.3d 345, 350-51 (6th Cir. 2002) (noting same). This and other courts have "considered evidence of prior discrimination occurring years before" enactment of a race-based remedy, sometimes finding the evidence convincing, *see, e.g., Vogel*, 959 F.2d at 600 (considering evidence of discrimination nine years before affirmative action plan instituted; upheld plan), *Stuart v. Roache*, 951 F.2d 446, 453 (1st Cir. 1991) (considering evidence of discrimination ten years before affirmative action plan instituted; upheld plan), and other times finding it unconvincing, *see, e.g., Brunet*, 1 F.3d at 409 (finding evidence of discrimination 14 years before enactment of affirmative action plan "too remote"). Here, the historical and contemporaneous evidence of discrimination in the 1970s and 1980s provided the *Shield Club* parties and the district court with a strong basis in evidence for the necessity of the original consent decree in 1977 and its amendment in 1984.

Finally, a valid race-based remedy is not limited to alleviating the current practice of racial discrimination, but can also address the "lingering effects" of such discrimination. *See Adarand*, 515 U.S. at 237; *see also Dean v. City of Shreveport*, 438 F.3d 448, 456-57 (5th Cir. 2006) (explaining that courts should consider whether "lingering effects of past discrimination still necessitate a race-conscious remedy") (citing *Paradise*, 480 U.S. at 169-70; *Police Ass'n of New Orleans v. Cannatella*, 100 F.3d 1159, 1168-69 (5th Cir. 1996)). This is necessarily the case in which the race-based remedy extends beyond the immediate moment into the future, when presumably the *practice* of discrimination has halted, but its *effects* are still felt. As discussed in more detail *infra* Sections II.E.2 and 4, the vestiges of racial discrimination had not been sufficiently relieved by 1992 and therefore the City defendants remained bound by the terms of the ACD.

Thus, with the admission by the City of past racial discrimination, supported by the findings of the district court and a review of the statistical evidence, the City defendants have shown convincing evidence of a compelling interest in increasing the number of qualified minorities among the CPD's ranks. We now turn to determine whether the City defendants crafted a measured, narrow remedy designed to attain that end.

E. Narrowly Tailored Remedy

As explained by the Supreme Court, "[t]he purpose of the narrow tailoring requirement is to ensure that 'the means chosen "fit" th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'" *Grutter*, 539 U.S. at 333 (quoting *Croson*, 488 U.S. at 493). There is no single "best" remedy – courts and other government bodies enjoy some discretion in remedying racial discrimination. *Paradise*, 480 U.S. at 185 ("While a remedy must be narrowly tailored, that requirement does not operate to remove all discretion from the District Court in its construction of a remedial decree."); *Donaghy*, 933 F.2d at 1461 (noting that "there is no universal answer to the problem of remedying racial discrimination" and that trial courts have sound discretion in fashioning remedy). Yet, as the district court in the *Shield Club* case succinctly noted, "[o]nly tough choices, each freighted with some weakness and the risk of individual or group inequities" face the body charged with remedying past discrimination. *Shield Club*, 370 F. Supp. at 254.

In determining whether the City's race-based remedial measure was narrowly tailored, the court must look to the following factors: "the necessity for the relief and the

efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; the impact of the relief on the rights of third parties." *Paradise*, 480 U.S. at 171 (citation omitted). These are not elements – the ACD need not satisfy each and every item to survive strict scrutiny. *See Ashton v. City of Memphis*, 49 F. Supp.2d 1051, 1056 (W.D. Tenn. 1999). Rather, after reviewing the ACD in light of all the factors, the court must be satisfied that the remedy is narrowly tailored to meet its remedial purpose. *See id.* Moreover, the fact that the ACD was reviewed and approved by the district court weighs in favor of finding that it was narrowly tailored. *See Donaghy*, 933 F.2d at 1459 (finding relevant the "heightened judicial oversight" of the affirmative action plan in determining whether it was narrowly tailored).

1. Necessity for the Race-Based Remedy and Efficacy of Alternative Remedies

To determine whether the CPD's race-based hiring plan was necessary, it is important to consider first the goal of the plan. The parties in the *Shield Club* lawsuits (by agreeing to the consent decree) and the district court (by entering the decree as a judgment) intended to ameliorate the effects of the City's past racial discrimination against African-Americans and Hispanics by temporarily increasing the number of these minorities hired as police patrol officers. Accordingly, the plan was appropriately focused on only the group of minorities proven to have been subjected to discriminatory practices. *Croson*, 488 U.S. at 506-07 (explaining that remedy must be "linked to identified discrimination" and not suffer from "gross overinclusiveness").

Appellants argue, however, that application of the remedial plan in 1993-1994 was not necessary for two

reasons. First, Appellants argue that its application was not necessary in light of the City's use of job-validated examinations and screening procedures for a number of years prior to 1993-1994. They also assert that the CPD hired "substantially more than the number of minorities between 1985 and 1992 than required by the terms" of the ACD. Given this, Appellants maintain, the plan was unnecessary in 1993-1994 to eradicate any remaining vestiges of discrimination. Both arguments fail on close examination.

A job-validated examination "identifies those skills important to a particular job and tests those skills." *Brunet*, 1 F.3d at 394. The use of validated, non-discriminatory hiring procedures can, under certain circumstances, be an acceptable alternative to race-based relief. *See Aiken*, 37 F.3d at 1164. For example, when a governmental body makes decisions based solely on the rank-order results from a job-validated examination, the race of the examination taker will not factor into the hiring decision. Over time, the effects of past discrimination should eventually dissolve away as the effects of the meritocracy begin to dominate.

In this case, however, the job-validated examinations and screening procedures were not effectively remedying the effects of past discrimination at the time the City entered the ACD. Although the patrol officer examination was validated in 1974, by 1984 the City's proportion of minority officers had only reached 20.8%. The 3:4 hiring ratio simply sped up the City's progress towards achieving its goal of a police workforce made up of 33% minority officers. The Supreme Court has held that hiring ratios are permissible as a means to regulate the speed of progress towards fulfilling a race-based plan's goal. *Paradise*, 480 U.S. at 179-80.[7]

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[7] We also point out that the CPD did not hire police patrol officers based purely on their examination score rankings – it had a measure of discretion in choosing

In support of its second argument, Appellants point out that the City hired an average of 84.6 police patrol officers per year during the 1985-1992 period, exceeding the ACD's annual minimum of 70 officers. By application of the 3:4 hiring ratio, this meant that the CPD hired more minorities (on average) than it would have if it had hired only 70 officers per year during that period. Thus, according to Appellants, there was no need for the remedial measures in 1993-1994.

As recognized by the district court, however, there is no basis in the ACD for this calculation. Appellants contest here the *interpretation* of the ACD, rather than its constitutionality. Although they have standing to challenge the ACD's constitutionality, *Rutherford*, 137 F.3d at 911, as non-parties to the decree, they do not have standing to enforce their understanding of its terms, *Aiken*, 37 F.3d at 1167-68; *Vogel*, 959 F.2d at 598. The City defendants were bound to follow the terms of the ACD, not some hypothetical plan now suggested by the Appellants. *See W.R. Grace & Co. v. Local Union 759, Int'l Union of The United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 766 (1983) ("It is beyond question that obedience to judicial orders is an important public policy. An injunction issued by a court acting within its jurisdiction must be obeyed until the injunction is vacated or withdrawn.") (citation omitted)).

Moreover, a brief review of Appellants' argument shows that it is without merit. The CPD continued to operate under the ACD in 1993-1994 because it failed to hire 70 officers in two different years during the initial 8-year period.

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candidates by operation of the 1:3 rule. Thus, there is no guarantee that use of a validated examination alone would have ameliorated the past effects of racial discrimination in the workforce.

Appellants are correct that, even with this two-year shortfall, the average number of officers hired per year exceeded 70. Thus, under their argument, the fact that the consent decree extended the 3:4 hiring ratio for two years even though the average hires exceeded 70 per year shows that the decree was not narrowly tailored.

Other than pointing to the average annual-hire figure, Appellants do not show how the 70-officer minimum rule somehow violates the constitution. In fact, had the ACD included a rule consistent with the Appellant's position – i.e., that the average number of hires per year should control – such a rule could have plausibly extended the race-based hiring plan well beyond the original expiration date, thus making the ACD more, not less, susceptible to attack on "narrowly tailored" grounds.[8,9]

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[8] To illustrate, assume 75 police officers were hired each year from 1985 to 1991; however, in 1992, assume the City placed a freeze on all officer hiring for one year. Also assume that from 1993 forward, the CPD again hired 75 officers per year. Under the ACD, the 3:4 hiring ratio would have been extended for one year. Under a rule in which the average must be 70 in the final year for the decree to expire, however, it would take 15 years, beginning in 1985, for the average to reach 70.

[9] In his concurring opinion, Judge Rogers states that the ACD was "open-ended depending on the actions of the City," and concludes that "[a] consent decree that permits affirmative action as an ongoing option, rather than as a limited requirement, should not so easily be maintained by relying on the discriminatory situation faced at the time of the original decree." In this particular case, however, we find that the minimum-70-officer rule made sense for several reasons, including: (a) the possibility of financial hardships causing the City to fall short in remedying past

2. Duration of Race-Based Remedy

Appellants next argue that the remedial measures extended too far in time in comparison with the discrimination the measures were meant to remedy. Courts view with disfavor those affirmative action plans that are not temporary and do not terminate when the identified racial imbalances have been eliminated. *See, e.g., Aiken*, 37 F.3d at 1164; *Detroit Police Officers Ass'n v. Young*, 989 F.2d 225, 228 (6th Cir. 1993); *Paradise v. Prescott*, 767 F.2d 1514, 1531 (11th Cir. 1985). As this court has noted, "[n]arrow tailoring . . . implies some sensitivity to the possibility that a [race-based] program might someday have satisfied its purposes." *Associated Gen. Contractors*, 214 F.3d at 737. It is also important to understand, however, that "[r]emedial action takes time . . . and discrimination may linger for many years in an organization." *Boston Police*, 147 F.3d at 20 (internal quotations omitted).

To determine whether the length of any race-based hiring plan is properly attuned with the workforce shortfall caused by discrimination, the reviewing court should consider the extent of the shortfall and the reasonable

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discrimination (which was one of the reasons for amending the original consent decree); and (b) the possibility (given the City's prior history of discrimination) that the City might try to thwart the goals of the consent decree by simply freezing hiring or hiring only a relatively few number of officers during the eight-year period of the consent decree. *See, e.g., McNamara v. City of Chicago*, 138 F.3d 1219, 1223 (7th Cir. 1998) (noting hiring freeze by the city immediately after it agreed to hire a higher percentage of minorities for fire department; when freeze ended, percentage of minorities remained unchanged). While the reasonableness of the rule does not, by itself, make the decree narrowly tailored, it is certainly a factor in its favor.

likelihood that it will be ameliorated promptly. Unlike some other plans struck down or questioned by this court,[10] the ACD was not intended to be a long-term or permanent remedy, as it contained a flexible, self-executing sunset provision. This provision ensured that the decree would last no longer than necessary to remedy (or approach remedying) the workforce minority shortfall caused by past racial discrimination. The decree further provided for an automatic, temporary extension in the event that: (a) the CPD did not hire at least 70 officers in any particular year; and (b) the 33% target had not yet been met. In this case, the plan continued for slightly less than two years as a result of this provision. Thus, this is not a plan which was "timeless in [its] ability to affect the future." *Wygant*, 476 U.S. at 276.

Appellants point to the fact that in 1992, the percentage of minorities in the CPD (29.6%) was closely approaching the 33% target. They assert that the CPD had substantially met the target, and therefore the ACD's continuation into 1993-1994 was unjustified. This argument would be stronger if the workforce convergence had occurred in the beginning or middle of the plan's intended duration, rather than near the end. Of course, *any* responsible race-based hiring plan should have as its ultimate goal the attainment of the target at the natural end of the life of the plan. The fact that the percentage of minorities on the CPD's police force was approaching the 33% target near the end of the plan is a testament to the plan's efficacy, not its unconstitutionality. Furthermore, the fact remains that although the ACD was successful in increasing the

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[10] *See, e.g., Assoc. Gen. Contractors*, 214 F.3d at 737-38 (noting with disapproval the lack of a sunset provision in legislation providing racial preferences in state contracts); *Aiken*, 37 F.3d at 1164 (finding that the city's failure to make any effort to limit the duration of remedy "cut[] against" finding it was narrowly tailored).

percentage of minorities in the CPD, the 33% target was not met until mid-1994. Once the target was met, the plan terminated of its own accord and did not reach beyond the length of time necessary to alleviate the remaining vestiges of identified discrimination.

3. Flexibility and Impact on Third Parties

Appellants next claim that the City's affirmative action plan did not contain sufficient flexibility. On the contrary, the ACD included several provisions giving the CPD flexibility in hiring officers. First, the decree precluded that City from hiring unqualified minority applicants. This is an important feature of any well-designed race-based hiring plan. *Vogel*, 959 F.2d 599 (noting with approval that the affirmative action plan required "the hiring only of *qualified* blacks and women; it [did] not require the selection of unqualified blacks and women over qualified white males" (emphasis in original)). The City graded the examination blindly, without reference to the race of applicants. If qualified minority candidates were not available from a given list, the decree provided that another entrance examination be offered and lists of qualified candidates be drawn from that separate examination. Appellants have provided no evidence that the CPD hired unqualified candidates in contravention of the decree.

Nor did the decree mandate that the CPD had to hire a certain number of minorities each and every year. The 70-officer minimum rule gave the CPD the option of hiring fewer than 70 officers in a given year if, for example, there was an insufficient number of qualified candidates that year. The CPD could then make up this shortfall in a later year, if necessary. This feature provided the CPD with flexibility in meeting its hiring needs with only qualified candidates. *See Paradise*, 480 U.S. at 177-78 (noting with approval a similar measure).

Furthermore, the decree did not require that incumbent non-minorities be terminated to make room for minority applicants. Of course, "initial employment opportunities coupled with hiring goals may burden some innocent individuals." *Vogel*, 959 F.2d at 599 (quoting *Long*, 911 F.2d at 1196-97). This type of remedy, however, does "not impose the same type of intrusive injuries that layoffs, which results in loss of job expectancy, security, and seniority, involve." *Id.*; *see also Paradise*, 480 U.S. at 182-83 (noting with approval that 1:1 hiring requirement did not require layoff and discharge of non-minority employees); *Wygant*, 476 U.S. at 283 (finding that the denial of future employment is not as intrusive as the loss of an existing job). Finally, non-minorities were not barred from hire – the CPD maintained separate lists of qualified minority and non-minority candidates and hired candidates from both lists. *Vogel*, 959 F.2d at 599 (noting with approval that affirmative action plan did not "present a complete bar to non-minorities"). With these provisions, the ACD contained sufficient flexibility with minimal impact on third parties to meet equal protection concerns.

4. Relationship of Numerical Target with Relevant Labor Market

The court must also consider the relationship between the ACD's numerical target and the relevant labor market. The "relevant labor market" is defined as the number of minority applicants who were actually qualified for the job – the "qualified labor pool." For jobs requiring no special qualifications, the relevant labor pool is often simply the pool of minorities within the local general population. *See Croson*, 488 U.S. at 501. The CPD requires special qualifications for its police patrol officers, however, such as passing entrance and physical examinations, psychological and medical evaluations, and a background investigation.

Accordingly, the court must look at the pool of minorities actually qualified to be police patrol officers when comparing this pool to the 33% target. *See id.* at 501-02 (noting that "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task").

The parties offer two different definitions of the qualified labor pool: (a) of those people who qualified to take and actually *took* the examination, the percentage who were minorities (the City defendants' qualified labor pool); and (b) of those people who *passed* the examination, the percentage who were minorities (Appellants' qualified labor pool). While both proposed definitions find support in the record, the distinction between the two proffered definitions is, in this case, one without a difference. Even under Appellants' stricter definition, there is a sufficiently close relationship between the qualified labor pool and the ACD's numerical target.

There exists no set formula for determining whether the 33% target fits "close enough" to the qualified labor pool. The question, rather, is whether the target represents "a plausible lower-bound estimate of a shortfall in minority representation" among the CPD resulting from racial discrimination. *McNamara*, 138 F.3d at 1224 (citing, among other cases, this circuit's decision in *Aiken*, 37 F.3d at 1165). The parties provide minority examination flow data for four separate years: 1982, 1989, 1992, and 1994. The percentage of examination passers who were minorities range from a low of 30.6% to a high of 47.3% (the percentage range of minority examination takers equals 41.0% to 52.3%). Specifically, the percentage of passers in 1982 who were minorities was 47.3%; in 1989, 45.6%; in 1992, 30.6%; and 1994, 33.7%.

Appellants point to the fact that in 1992, the percentage of passers who were minorities (30.6%) was almost identical to the percentage of minorities on the police force (29.6%). The year-to-year fluctuations in the qualified labor pool, however, are of little to no relevance to whether the plan was narrowly tailored. While there may be long-run demographic trends which drive the average of the percentage of examination passers who are minorities close to 33% (or, more likely, a higher percentage equal to the percentage of minorities residing in the City), there is nothing to suggest that the examination pass rate in 1992 had any direct or causal relationship to the minority police force figure of that same year. The annual pass rates undoubtedly exhibited a certain element of randomness from year-to-year, while the minority police force percentage was being driven to 33% by operation of the 3:4 hiring ratio.

The better comparison in this case is between the ACD's target of 33% and the *range* of minority examination passers over the years. Given that the annual pool of qualified candidates from which the CPD had to choose ranged between 30.6% to 47.3% minority candidates (using the Appellants' more conservative definition) over the relevant years, a workforce target of 33% was sufficiently related to the qualified labor pool, if not a bit conservative.

The fact that the 33% target was at a lower bound of the conservative qualified labor pool further illustrates that the 29.6% minority workforce in 1992 was not "close enough" to the target for the CPD to have ignored the terms of the ACD and stopped using the 3:4 hiring ratio in 1993-1994. The standard is not whether the CPD had come close to satisfying the terms of the ACD, but rather "whether the vestiges of past discrimination had been eliminated *to the extent practicable*." *Jansen*, 977 F.2d at 244 (quoting *Bd. Of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237, 250 (1991)) (emphasis added). Certainly, the percentage of

minorities in the CPD workforce was increasing throughout the 1980s and early 1990s. Even so, the CPD had not yet reached the 33% target, the level at which the parties agreed, the district court approved, and we confirm, was a reasonable lower-bound measure of the relevant qualified labor pool. Within the context of the ACD as a whole – a temporary plan, the City's admitted history of discrimination, and a modest target – we find that the CPD did not err in following the terms of the ACD in 1993-1994 even though it was approaching the target in 1992.

Finally, Appellants take issue with the 3:4 hiring ratio, arguing that the rate of hire (42.9%) far exceeded the 33% target. As a matter of simply comparing the percentages, they are correct. Yet, Appellants ask us to compare apples to oranges. The 33% figure represents the CPD police force minority target; the 3:4 hiring ratio represents the speed to which the target was to be met. As explained *supra* Section II.E.1, there is nothing unconstitutional about the 3:4 hiring ratio as a reasonable rate of hire to meet the 33% minority workplace target. *Paradise*, 480 U.S. at 179-80 (approving 1:1, or 50% hiring rate to meet 25% minority workplace target).

F. The ACD Satisfies Equal Protection Concerns

Given the modest workforce target, the sunset provision, and the various flexibility provisions, we find that the ACD was narrowly tailored to remedy the City's past discrimination against minorities. The City defendants did not violate the Appellants' rights under the Equal Protection Clause or Title VII of the Civil Rights Act by following the ACD in 1993-1994.[11] Accordingly, the district court

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[11] Although a public employer's obligations under the Equal Protection Clause and Title VII are not identical, *Brunet*, 1 F.3d at 405, Appellants have not argued that their

properly granted judgment to the City defendants on these claims.

G. Appellants' Disparate Treatment Claims

In addition to their claim that the ACD, as a whole, violated their constitutional and statutory rights, several of the individual Appellants also argue that they faced disparate treatment by the City defendants. Specifically, they argue that the CPD's use of the 1:3 rule shielded less-qualified minority applicants from competition against them. They also allege they were victims of reverse discrimination because the City defendants used background checks and selection procedures against them in a disparate manner.

Appellants do not suggest here that any of the minority candidates hired in 1993 or 1994 were not qualified. They insist, rather, that for various reasons they were *more* qualified than some of the minority candidates who were ultimately hired. As explained by the district court, however, "[d]egrees of qualification" are not the proper focus here.

As already discussed, rather than relying on a pure rank-order rule, the City hired officers using the 1:3 rule in conjunction with separate minority and non-minority candidate lists. Thus, within the framework of the 1:3 rule, minorities were compared against other minorities, and non-minorities were compared against other non-minorities.[12]

Title VII claims relating to the ACD's application in 1993-1994 differ in any way from their equal protection claims.

[12] This feature distinguishes the present case from *Voels v. New York*, 180 F. Supp.2d 508 (S.D.N.Y. 2002), relied upon by Appellants in their reply brief. The government actor in that case also used a 1:3 hiring rule, but with the critical difference being that separate lists of minorities and non-minorities were not maintained. Thus, in

Any leniency afforded minority candidates on the minority eligibility list would affect only other minority candidates, and not the individual Appellants. It is only when one steps outside the 1:3 framework and views the ACD as a whole that it can be said that Appellants were treated differently than minority candidates. Yet, as explained above, the different treatment of minority and non-minority candidates under the remedial hiring plan met constitutional muster.

On Appellants' claim of reverse discrimination based on the City's background checks and screening procedures, the district court correctly found that Appellants failed to show that the CPD was "that unusual employer who discriminates against the majority." *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985) (citation omitted). Appellants were not similarly situated to minorities who were allegedly treated more favorably. Accordingly, the district court properly granted summary judgment to the City defendants on Appellants' disparate treatment claims.

III. CONCLUSION

For the reasons provided above, we AFFIRM the district court's grant of summary judgment in favor of the City defendants.

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any group of three, minorities and non-minorities were likely competing directly against each other.

KAREN NELSON MOORE, Circuit Judge, concurring. I join in the majority's opinion but write separately to respond to the concurring opinion's suggested narrowing of the category of individuals entitled to relief due to past discrimination. The concurring opinion could be read to state that only a plan benefiting those individuals who suffered discrimination themselves or who were "around at the time the discrimination took place" will survive strict scrutiny analysis; it further states that "a limited remedy of, for example, up to 10 years" would be permissible for the latter group. Concurring Op. at 1-2. This part of the concurrence is based upon the following statement from *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 508 (1989): "But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to *those who truly have suffered the effects of prior discrimination* cannot justify a rigid line drawn on the basis of a suspect classification." (emphasis added). However, *Croson* does not imply that those who suffer the *effects* of prior discrimination must have been "around at the time the discrimination took place." Such a conclusion would fail to acknowledge the key distinction between eliminating facially discriminatory policies and the continuing effects of historically institutionalized racial discrimination; it would also fail to acknowledge that ten years will often be an unrealistic amount of time in which to eradicate the effect of years – often many decades – of discrimination. "As long as significant specified effects linger, affirmative action may be justified despite the implementation of valid selection procedures. Public employees cannot escape their constitutional responsibilities merely by adopting facially-neutral policies that institutionalize the effects of prior discrimination and thus perpetuate *de facto* discrimination." *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1575 (11th Cir. 1994) (citing *United States v. Fordice*, 505 U.S. 717, 729 (1992)).

ROGERS, Circuit Judge, concurring. I concur entirely in the majority opinion. I write separately to acknowledge two troubling aspects of our decision, and to identify an additional consideration supporting our judgment.

Between 1972 and 1977, the City defended a lawsuit in which the Shield Club argued that the City had discriminated in its hiring, transfers, and promotions of minority police officers. The City maintained throughout that it had never discriminated against minorities. Nevertheless, after years of litigation and findings of intentional discrimination by the district judge, the City entered into a consent decree governing the hiring and promotions within its police department.

In 1984, the Shield Club moved to modify and extend the consent decree. The City opposed the motion, but it ultimately agreed. A decade later, despite faithfully following the terms of the ACD, the City once again was forced to defend against allegations of racial discrimination when the appellants brought the present lawsuit in May 1994, just one month before the ACD reached its goad in June 1994. This time, however, the City was targeted not for discriminating against minorities, but for discriminating against nonminorities by following the terms of the ACD. The plaintiffs argued that the ACD should not have been extended beyond 1992, and thus that the City had been acting illegally for the subsequent year and a half in complying with the ACD.

Had this case instead been brought in 1992 to modify or terminate the consent decree, the reasoning of the majority opinion might well have supported continuation of the decree. Two factors, however, give me pause in reaching that conclusion.

First, the ACD arguably had been in place too long to be narrowly tailored. In an affirmative action plan seeking to remedy past discrimination, there are essentially three possible groups that stand to benefit: (1) those actually discriminated against, (2) those not actually discriminated against but who are members of the same group as those discriminated against and who were around at the time the discrimination took place (justifying a limited remedy of, for example, up to 10 years), and (3) other members of that group at any time (as an extreme example, 75 years after the discrimination). In this case, the minority recruits are mostly members of the third group because few of them would have been old enough to be hired as police officer when the discrimination took place in the 1970s.

In *City of Richmond v. J.A. Croson Co.*, the Supreme Court's analysis brings into question whether a plan benefiting only group three survives strict scrutiny:

> [T]he Richmond Plan's waiver system focuses solely on the availability of MBE's; there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors.
>
> Given the existence of an individualized procedure, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simple administrative convenience. But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to *those who truly have suffered the effects of prior*

> *discrimination* cannot justify a rigid line drawn on the basis of a suspect classification.

488 U.S. 469, 508 (1989) (emphasis added). In addition, Justice Stevens noted:

> The class of persons benefitted by the ordinance is not, however, limited to victims of such discrimination–it encompasses persons who have never been in business in Richmond as well as minority contractors who may have been guilty of discriminating against members of other minority groups. Indeed, for all the record shows, all of the minority-business enterprises that have benefitted from the ordinance may be firms that have prospered notwithstanding the discriminatory conduct that may have harmed other minority firms years ago.

Id. at 515 (Stevens, J., concurring). Similarly, the minority recruits that benefitted from the ACD extension were hired even though they may have never suffered from the effects of racial discrimination. Of course, on the other hand, it is impossible to know who would have been hired under a nondiscriminatory system when, during the pendency of the consent decree, a separate remedial quota system was in place. Perhaps some of the young minority beneficiaries of the ACD in the early 1990s who would not have been hired without the ACD would have been hired had there never been any discrimination.

Second, the consent decree was open-ended depending on the actions of the City. By continually hiring fewer than seventy police officers per year, the City could have extended the ACD indefinitely. A consent decree that permits affirmative action as an ongoing option, rather than

as a limited requirement, should not so easily be maintained by relying on the discriminatory situation faced at the time of the original decree. The reasonableness of the 70-per-year rule in terms of protecting minorities from city evasion of consent decree requirements does not necessarily imply that the rule is narrowly tailored for purposes of protecting the interests of nonminority applicants adversely affected by the decree.

While these considerations may in the end not have been sufficient to warrant modification of the ACD two years before it reached its goal, they at least raise serious concerns as to whether the decree continued to be narrowly tailored at that point. We do not need to resolve the issue because, in my view, a somewhat more deferential approach is required when, instead of moving to modify the decree, the officers sued after the fact for retroactive relief based on the failure of the City to violate the decree.

To award damages against the City because it failed to violate a consent decree would be troubling for a number of reasons. First, it would be inequitable to force the City to pay damages for faithfully implementing the affirmative action plan that it had challenged for years in court. The case would be different if the City entered into a consent decree that was clearly illegal at the time, or if the City subsequently ignored a new decision or statute that made it clear that its conduct was illegal. But when the City entered into the ACD, the Supreme Court had yet to announce in *Croson* that strict scrutiny should be used in evaluating state and local affirmative action programs. *See* 488 U.S. at 493-94. There is little doubt that, in 1984, the affirmative action program was legal under existing caselaw. Even after *United States v. Paradise*, 480 U.S. 149 (1987), *Croson*, and subsequent cases were decided, it was not immediately clear that the extension of the ACD was unconstitutional.

Second, permitting retrospective relief would place parties like the City in a problematic legal position. A party is bound by a court order even if the party strongly disagrees with the order. If we award damages for failure to violate a court order, we are in some sense telling the party that it should have violated the order. Perhaps when compliance with a court order clearly violates the constitutional rights of third parties, a party should violate the order and use its legal position to defend the enforcement of contempt sanctions against it. But where the illegality of the order is not so clear, certainly a party ought to comply. This shows the respect for the system that is necessary on the part of responsible participants in our ordered republic.

Instead of violating a court order perceived to be illegal, a party should generally litigate to modify the order. One might certainly argue that the City should have sought a modification of the ACD as soon as the argument became tenable that the decree was not narrowly tailored. But such an obligation to seek to modify cannot require a litigant (here the City) to challenge a decree continuously during its pendency. Such an obligation also arguably disrespects the system, especially where the judicial order resulted from vigorous litigation, as here, and where the change in factual and legal circumstances was not clearly marked. Thus, for us to reverse the district court in this case and impose retrospective relief for failure to violate the decree, we should determine not only that the decree would properly have been modified had modification been timely sought, but also that the unconstitutional nature of compliance with the decree was sufficiently clear to the City as to require the City to have returned to court in 1992 to lift the decree. In my view, for the reasons given in the majority opinion, we cannot say that the ACD was so clearly unconstitutional as to require the City sua sponte to have sought modification in 1992, and we need not decide the closer question of whether

such a modification would have been required had it been sought by the officers at that time.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JANELL RUTHERFORD, *et al.*,	)	CASE NO. 1:94 CV 1019
Plaintiff,	)	
	)	JUDGE DONALD C.
v.	)	NUGENT
CITY OF CLEVELAND, *et al.*,	)	MEMORANDUM OPINION AND ORDER
Defendant.	)	

This matter comes before the Court upon cross-motions for partial summary judgment. Both Plaintiffs and Defendants filed Motions for Partial Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on June 1, 2000 (Doc. # 77, # 79, respectively). Defendants include the following: the City of Cleveland, Mayor Michael R. White, William Denihan, Freddi J. Fenderson, James J. Merriellna, Donna K. Nelson, Dorothy M. Miller, Timothy J. Cosgrove, Karl Schneider, Patrick Oliver, and Carol Watts Allen (hereinafter collectively "Defendants" or "the City"). Plaintiffs and Defendants filed Memoranda in Opposition and Replies thereto. For the following reasons, Defendants' Motion for Partial Summary Judgment as to Counts I and IV is GRANTED, and Plaintiffs' Motion for Partial Summary Judgment as to Counts I and IV is thereby DENIED.

I. PROCEDURAL AND FACTUAL BACKGROUND[13]

This case began long before 1994, as its case number indicates. It is, therefore, necessary for the Court to provide a somewhat extensive background prior to addressing the substance of the pending motions. Generally, this case relates to two previous actions filed in this Court by an organization named the Shield Club, which is composed primarily of African-American police officers who represent the interests of minority officers and applicants for police officer positions. In 1972 and 1977, the Shield Club, along with individual minority plaintiffs, filed a complaint against the City and other defendants. Those cases, consolidated by this Court, are collectively referred to in this Memorandum Opinion and Order as "the *Shield* case."[14]

The issues in this case focus upon the American human experience of the history of race relations in the City of Cleveland and the United States, the evolution of the law, and the fundamental right of the poor, the powerless, and the victims of racial discrimination to have their grievances heard fairly and impartially by a judge in a court of law.

The long and tumultuous struggle for racial equality in the United States often resulted in anger, frustration, disappointment, and all too often, bloodshed. The Civil War was fought and won, in part, so that all Americans could live in freedom. Victory came only after tens of thousands suffered and died. The Fourteenth Amendment to the

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13 The factual summary is based upon the parties' statements of fact. Those material facts which are controverted and supported by deposition testimony, affidavit, or other evidence are stated in the light most favorable to the non-moving party.

14 The Court consolidated the 1977 case, No. C77-346, with the 1972 case, No. C72-1088.

Constitution was ratified in an attempt to afford all Americans equal protection under the law.

The struggle for freedom and equality continued on the streets with American pitted against American. Cultural and philosophical differences led to violence. Cities erupted in race riots throughout the United States. Champions of freedom and equality, the Reverend Martin Luther King and Senator Robert Kennedy, were assassinated to silence their voices.

It is with this historical background of the American human experience that the Shield Club, a small group of minority Cleveland police officers, came to a federal court on October 12, 1972 – 28 years ago today – and filed this action alleging widespread, systematic, and intentional racial discrimination throughout the Cleveland Police Department regarding hiring, transfers, and promotions. The new battleground to achieve equality and freedom had become the federal courts. By the time judicial findings were made in this case, the United States Supreme Court had made it not only the law of the land that racial discrimination in the hiring, transfer, and promotion of candidates violated the Constitution, but also that District Court judges had the duty to develop and implement remedial measures designed to end such discrimination. Judges were required to fashion these remedies based upon the facts and circumstances unique to the case before the Court. Little additional guidance was given by the Supreme Court in the beginning.

The remedial measures developed and implemented by District Court judges certainly had an enormous impact in ending much of this discrimination, and they offered opportunities to minorities which had previously not existed. These new opportunities for minorities came at both a real and a perceived cost to affected non-minorities. The remedial measures often resulted in the loss of opportunity

for non-minorities. This loss, however, the Supreme Court repeatedly stated, was an acceptable price to pay in order to remedy past and present discrimination.

The instant case, which began 28 years ago with the claim by minority police officers of intentional discrimination, is now before the Court upon the claims of several hundred non-minority candidates alleging intentional discrimination by the City of Cleveland against them. Thus, it is with this preamble that the Court endeavors to follow the law.

A. The *Shield* Case

In the *Shield* case, Plaintiffs alleged racial discrimination in the City's Police Department (hereinafter "CPD") against African-Americans and Hispanics. *See Shield Club v. City of Cleveland*, 370 F. Supp. 251 (N.D. Ohio 1972). The alleged discrimination arose in the recruitment, testing, screening, and hiring of new patrol officers[15] and in the assignment, treatment, and promotion practices of current officers. *Id.* The evidence in the *Shield* case revealed that, *inter alia*, the tests administered as part of the July 15, 1972 entrance examination for patrol officers had a racially discriminatory impact upon Black and Hispanic applicants for the position. Of all persons who completed the examination, 23% were Black or Hispanic; of the total number of persons who failed the examination, 64% were Black or Hispanic; of the total number of Blacks and Hispanics who took the test, 26.3% failed, whereas only

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[15] While the record in the *Shield* case, as well in the instant case, contains the term patrolman to generally describe patrol officers, which includes both men and women, this Court shall use the term patrol officers throughout this Memorandum Opinion and Order for purposes of clarity and consistency in referring to the relevant position.

4.5% of the Caucasian applicants failed. *Id.* at 253.

In the *Shield* case, the Honorable William K. Thomas issued several orders over a number of years that are relevant to the case at bar. Amongst others addressed later in this Memorandum Opinion and Order, Judge Thomas issued an Order in 1972 addressing the alleged discrimination in the entrance examination; in 1974, he issued two Orders addressing, amongst other issues, applicant screening, recruitment, hiring, and promotions; in 1976, he issued another two Orders relating to assignments and transfers of patrol officers within the CPD; and in 1977, he approved a Consent Decree between the parties concerning these issues. This Court now examines those orders in turn.

1. The 1972 Order

In an Order dated December 21, 1972, Judge Thomas held that the City failed to overcome Plaintiffs' prima facie showing of the entrance examination's racially discriminatory impact, as evidenced by the high percentage of minority failures relative to Caucasian failures on the examination. *Id.* Despite the City's arguments to the contrary, Judge Thomas found that a lack of discriminatory intent did not off-set the discriminatory impact on the minority individuals. *Id.* Due to the City's failure to demonstrate that these tests were job-related, Judge Thomas concluded that the appropriate remedy was to direct the CPD to appoint a certain number of Blacks and Hispanics who passed the 1972 test to the position of patrol officer. *Id.*

Judge Thomas then set forth the appropriate formula to be used by the CPD in making such appointments. *Id.* Under that formula, the number of appointments were fixed at a percentage or fraction in which the numerator was the total number of Blacks and Hispanics who passed the examination, and the denominator was the total number of

all persons who passed the examination. *Id.* As such, approximately 18% of the 188 patrol officers hired by the CPD would be Blacks and/or Hispanics who passed the 1972 entrance examination. *Id.* Judge Thomas also directed Defendants to employ a validation study and create an examination that was, indeed, job-related. *Id.* at 256.

2. The 1974 Orders

Some time later, on July 6, 1974, Judge Thomas issued an Order addressing Plaintiffs' claims with respect to the CPD's screening procedures used to determine which applicants, of those who had passed the entrance examination, may be properly appointed patrol officer. More specifically, Judge Thomas addressed Plaintiffs' allegations that the screening procedures had a racially disparate impact upon the minorities who passed the examination. *Shield Club v. City of Cleveland*, No. C72-1088 at *1 (N.D. Ohio filed July 6, 1974). In light of evidence of "statistical disparities" within the minority and non-minority population of the City, Judge Thomas directed the CPD to institute new screening procedures in order "to devise and to administer screening procedures as racially neutral as the February 1974 entrance examination." *Id.* at *2.

In the same Order, Judge Thomas addressed the CPD's recruitment and assignment practices. With regards to recruitment, Judge Thomas determined that the 1974 recruitment program "offer[ed] a workable in-depth model for the recruitment of minorities" and it was "the type of affirmative action" in recruiting minorities that must be continued. *Id.* As it pertained to assignments, however, Judge Thomas held that the CPD must implement an objective plan for administering and publicizing available assignments. *Id.* at *3. Although Judge Thomas stated that "the entire record [did] not convince [him] that the plaintiffs

[had] established a historic pattern of racial discrimination in the [CPD]," the record revealed that the CPD administered the procedure for requesting and obtaining assignments in a haphazard and subjective fashion, causing the minority participation to vary from unit to unit. *Id.*

In a separate Order of the same date, Judge Thomas addressed the allegations of discrimination in promotions to positions above the rank of patrol officer. *Shield Club*, No. C72-1088 at *1 (N.D. Ohio filed July 6, 1974). He concluded that there was, indeed, discrimination in the 1973 promotional criteria, including examinations and seniority credit. *Id.* In this Order, Judge Thomas directed the City to create a new sergeant's promotional eligibility list, new promotional examinations for the position of sergeant and above, and to produce job-related, validated examinations. *Id.* at *23.

3. The 1976 and 1977 Orders

In September of 1976, Judge Thomas issued two additional Orders in the *Shield* case. In the first Order, Judge Thomas concluded that the City intentionally discriminated in the administration of assignments and transfers. He stated as follows:

> [T]he continuing marked under[-]representation of minority police officers, existing on July 6, 1974, when it was called to the attention of the administrators of the Cleveland Police Department, in the 1st and 2nd Districts and certain special units, without explanation or justification, requires the conclusion, now made, that the Chief of Police had and continues to have a racially discriminatory purpose in perpetuating such marked under[-]representation, and in administering the transfer and assignment process.

Shield Club, No. C72-1088 at *11 (N.D. Ohio filed Sept. 27, 1976). In the second Order, Judge Thomas found intentional discrimination in the making of certain sergeant promotions in 1975. *Shield Club*, No. C72-1088 (N.D. Ohio filed Sept. 29, 1976).

Thereafter, on November 11, 1977, following approximately five years of litigation between the Shield Club, the City, and the Fraternal Order of Police (hereinafter "FOP"),[16] Judge Thomas approved a Consent Decree entered into by the parties. As the City contends and the record reveals, Defendants vigorously contested the litigation and the creation of the Consent Decree. In fact, the FOP refused to sign the Decree. The Court now turns its attention to the substance of the Consent Decree.

4. The Consent Decree

In examining the substance of the Consent Decree, the Court first looks to the contents in terms of the specific provisions contained therein. Next, the Court reviews the approval hearing held by Judge Thomas on the Consent Decree. Finally, the Court considers the modification and extension of the Consent Decree.

The Contents of the Consent Decree

The Consent Decree governed the CPD's hiring, transfer, and promotion practices. Its purpose was to "effectuate an effective prospective remedy designed to eliminate all vestiges of race discrimination within the City of Cleveland Police Department." (Doc. # 79, Ex. B ¶ 1) The Consent Decree stated:

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[16] Upon motion, the FOP intervened at the commencement of the litigation as a party-defendant.

> This Order follows upon an extended history of hearings, findings, and orders in C72-1088, including but not limited to the following: an order dated December 21, 1972 finding discrimination in the 1972 entrance examination (370 F. Supp. 251); an order dated July 6, 1974 finding discrimination in the defendants' recruitment practices and defendants' post-examination screening practices (8 E.P.D. ¶ 9614); an order also dated July 6, 1974 finding discrimination in the 1973 promotional criteria (examinations and seniority credit) (8 E.P.D. ¶ 9606); an order dated September 27, 1976 finding intentional discrimination in the administration of assignments and transfers (14 E.P.D. ¶ 7763); and an order dated September 29, 1976 finding intentional discrimination in the making of certain Sergeant promotions in 1975.

Id. ¶ 2. It further provided that "[a]s reflected by the entire record in C72-1088 and C77-346, there has been a history of race discrimination in the hiring practices and in the promotion practices of the [CPD]." *Id.* at 3. Based upon this fact, the Consent Decree outlined various remedies agreed to by the parties in an effort to ameliorate "the present effects of past discrimination." *Id.* ¶¶ 12, 17. In so doing, the Consent Decree addressed recruitment, hiring, transfers, and promotions.

Concerning the recruitment of minority candidates, the Consent Decree provided that the CPD should exercise various measures in an effort to increase the number of minority applicants for the position of police officer.[17] Such

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[17] The Consent Decree defined "minority" as "Black and Hispanic persons." (Doc. # 79, Ex. B ¶ 7). "Hispanic" was intended to refer to "Spanish speaking persons who were born or who are

measures included creating an on-going minority recruitment unit and conducting an "intensified recruitment effort" for at least two months prior to the opening date for the acceptance of applications for all future entrance examinations. *Id.* ¶ 13.

In addressing the CPD's hiring practices, the Consent Decree provided that Defendants shall utilize "only such selection criteria . . . as are non-discriminatory and demonstrably job-related." *Id.* ¶ 9. Furthermore, the CPD agreed to do the following: (1) establish a minority hiring goal of not less than 35.8% (adopted by the City's "Affirmative Action Plan" and "based upon external labor market figures contained in the 1970 census"); (2) establish "appropriate time-tables" for attaining the goal; and (3) hire no less than three minorities for every four non-minority hires, "temporarily and until such time as at least 90-95% of the goal" is attained. *Id.* ¶¶ 9-12. The Consent Decree also allowed for the CPD's use of the "one in three" rule set forth in § 131 of the Charter of the City of Cleveland. That rule gave discretionary power to the Safety Director in making appointments to the position of patrol officer. More specifically, the rule stated that "[t]he appointing authority shall appoint to such position one of the three persons whose names are so certified." *Shield*, 370 F. Supp. at 256. However, to the extent that the use of the rule failed to achieve the relevant goal, the Safety Director, nevertheless, was required to comply with the dictates of the Consent Decree. (Doc. # 79, Ex. B ¶ 12(c)(4) (referring to *Shield*,

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descended from persons who were born in Puerto Rico, Cuba, other Carribean countries or Mexico." *Id.* In addition, "Police Officers," as used in the Consent Decree, "refers to male or female persons hired originally in the civil service category of patrolmen, patrolwoman or police officer or the equivalent thereof and employed by the Cleveland Police Department." *Id.* ¶ 8 (internal quotations omitted).

370 F. Supp. at 256))

In addressing the issue of promotions in the Consent Decree, Defendants agreed to utilize "only such promotion criteria as are non-discriminatory and demonstrably job related." *Id.* Furthermore, Defendants agreed to do the following as a temporary remedy: (1) establish new promotion examinations and eligibility lists developed therefrom; (2) develop separate sergeant and lieutenant promotional lists for minorities and non-minorities; (3) promote no less than one minority sergeant for every four non-minority sergeants and no less than one minority lieutenant for every seven non-minority lieutenants; and (4) refrain from any efforts to make substantially less than normal the number of promotions during the 1978-1984 period. *Id.* ¶¶ 15-17.

Finally, the Consent Decree provided that Defendants were obligated to supply Plaintiffs' counsel with semi-annual progress reports of the City's compliance. At the time, 9.2% of the City's police officers were minorities. The Court retained continuing jurisdiction over the matters addressed in the Consent Decree for a period of five (5) years. *Id.* ¶¶ 18, 21.

The Approval Hearing

In 1977, Judge Thomas held an approval hearing on the Consent Decree. During that hearing, Judge Thomas addressed whether the *Shield* plaintiffs had proven their claim of a historic pattern of racial discrimination. In addressing this issue, Judge Thomas referred back to his July 6, 1974 ruling, in which he stated that "the entire record [did] not convince [him] that the plaintiffs [had] established a historic pattern of racial discrimination in the [CPD]." *Shield Club*, No. C72-1088 at *3 (N.D. Ohio filed July 6, 1974). Judge Thomas noted in the approval hearing,

however, that such "finding [was] not engraved in stone." (Doc. # 81, Ex. K at 48)

In the approval hearing, Judge Thomas focused on Paragraph 3 of the Preliminary Matters section of the Consent Decree. (Doc. # 79, Ex. B ¶ 3) That paragraph stated that the "entire record" reflected a "history of race discrimination in the hiring practices and in the promotion practices" of the CPD. *Id.* Judge Thomas, therefore, concluded that in light of this admission by the City, a hearing "to go all through what evidence was spread on this record for five years" was not necessary. Accordingly, Judge Thomas determined that the record before him was sufficient to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." He also recognized that due to "the complexity, expense and likely duration of such litigation, *** and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise," a hearing was not merited in this particular case. (Doc. # 81, Ex. K at 49 (citation omitted)) Consequently, Judge Thomas accepted the parties' admission of past discrimination and the City's stipulation of racial discrimination without a trial, and signed the Consent Decree entered into on November 11, 1977. Thus, theoretically, the Consent Decree was now in effect until its scheduled expiration in 1982. Based upon a subsequent joint motion of the parties, however, it was extended until December 31, 1984.

The Modification and Extension of the Consent Decree

On October 25, 1984, the *Shield* plaintiffs filed a Motion to Modify and Extend the Consent Decree. The *Shield* plaintiffs stated that the modification and extension were necessary because the City had not met its goals established in the Consent Decree and "[a]ctive judicial involvement" in the issues addressed in the Consent Decree

would cease on December 31, 1984. (Doc. # 79, Ex. D at 1). Initially, the City, the FOP, and the Cleveland Police Patrolmen's Association (hereinafter "CPPA")[18] opposed Plaintiffs' Motion, contending that the City did not consent to any prolongation of the Consent Decree or any of its terms and the Court lacked the power to impose such an extension. *Id.*, Ex. F at 4. Plaintiffs also sought discovery on the matter, which Defendants opposed, as well.

On November 29, 1984, Judge Thomas denied the *Shield* plaintiffs' Motion to Extend the Consent Decree as it related to the CPD's promotional practices. As it related to the CPD's hiring practices, however, Judge Thomas determined that the Shield Club had raised an issue of fact which might warrant extension of the Consent Decree. *Id.*, Ex. J. In particular, Judge Thomas concluded that there was a factual issue as to what the parties meant in terms of "whether the City came upon hard times and was not able to hire [and] that time should somehow be taken out of the period of this decree, and therefore, in effect, become a basis for modification by way of extension." *Id.* In accordance with Judge Thomas' ruling, the Court conducted six (6) days of hearings in November and December of 1984. As a result of the hearings, on December 21, 1984, the parties entered into an Amended Consent Decree.

5. The Amended Consent Decree

In contrast to the original Consent Decree, the Amended Consent Decree pertained only to the CPD's hiring practices. To that end, the Amended Consent Decree expressed the parties' intent to "finally and fully resolve these actions so as to preclude any further requests for

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18 The CPPA intervened as a party-defendant for purposes of challenging any extension or modification of the original Consent Decree.

extension and/or modification. . . " (Doc. # 79, Ex. K at 1) Thus, the Court now examines the contents of the Amended Consent Decree. After doing so, the Court reviews the pertinent events taking place after the Amended Consent Decree's creation.

The Contents of the Amended Consent Decree

With regards to the hiring procedures implemented by the CPD, the Amended Consent Decree, not unlike the original Decree, provided that Defendants will use "only such selection criteria . . . as are non-discriminatory and demonstrably job-related." *Id.* ¶ 2. In addition, the one in three rule as prescribed in the original Consent Decree was to continue. *Id.* ¶ 3.

In order to "partially remedy the present effects of past-discrimination" in the City's selection of patrol officers, the Amended Consent Decree provided for certain temporary measures, including "vigorous recruitment" of minority candidates and continuation of the previously established seven point preference for residents of the City. *Id.* ¶ 4(a)(1),(2). The Amended Consent Decree mandated that:

> [t]emporarily and until such time as 33% of the police officers employed by the City are minorities or until December 31, 1992 (eight years), whichever time or event occurs first, defendants shall hire no less than three minority police patrol officers for every four non-minority police patrol officers. . . .

Id. ¶ 4(a). It further provided that in the event Defendants failed to hire a minimum number of 70 patrol officers in any of the eight calendar years beginning January 1, 1985 and ending December 31, 1992, the hiring ratio described above would continue "in full force and effect for one additional year for each year in which the City shall fail to hire the

minimum number of police patrol officers, unless the City has otherwise achieved the 33% level" as outlined in Paragraph 4(a) of the Decree. *Id.* ¶ 4(b). Moreover, the Amended Consent Decree required Defendants to use separate eligibility lists for minority candidates. *Id.* ¶ 4(c).

The Amended Consent Decree concluded by stating that it "shall be final and binding" on all matters raised in Case Nos. C72-1088 and C77-346, with the exception of the issue concerning compliance with the Court's previous Orders pertaining to assignments and transfers "over which this Court shall exercise independent scrutiny." *Id.* ¶ 9. Furthermore, it provided that all provisions of the Amended Consent Decree would remain in effect for the periods described in Paragraphs 4(a) and 4(b) outlined above. It stated, "[t]he Court shall retain continuing jurisdiction over this action for the express and limited purpose of enforcing the provisions of this amended consent decree. . . . The Court's jurisdiction shall not be extended beyond the periods defined in Paragraphs 4(a) and 4(b), notwithstanding the fact that the purpose of this amended consent decree may not have been fully achieved." *Id.* ¶ 11.

After the Establishment of the Amended Consent Decree

Subsequent to the signing of the Amended Consent Decree, there were two years in which the City did not hire 70 patrol officers. In 1986, the City hired 25 minority applicants and 23 non-minority applicants for a total of 48 applicants. (Defendants' Admissions, Req. # 23) In 1991, the City hired 27 minority applicants and 37 non-minority applicants for a total of 64 applicants. (Defendants' Admissions, Req. # 29) Consequently, the Amended Consent Decree was extended by its terms until December 31, 1994, or until the City had achieved the 33% level of minority hires.

Thereafter, upon the FOP's unopposed motion, the Court terminated the Amended Consent Decree, finding that the City had met the threshold 33%. In his Order of May 15, 1995, Judge Thomas stated as follows:

> Upon evidence submitted by the parties, that since on or about June 16, 1994, the number of minority police officers on the City of Cleveland police force has equaled or exceeded 33 percent of the total number of Cleveland police officers. . . . As a consequence, Cleveland has fully complied with the requirements of paragraph 4 of the decree.

(Doc. # 79, Ex. M ¶ 1). Judge Thomas further stated that the Amended Consent Decree "expired in accordance with the provisions of paragraph 4 governing its duration." *Id.* ¶ 3. Based upon this disposition of the *Shield* case, the Court now turns its attention to the procedural posture of the instant matter and the relevance of the *Shield* case to this Court's decision on the pending cross-motions.

B. The Instant Case: *Janell Rutherford, et al.*

Plaintiffs filed this class action Complaint against the City on May 17, 1994. The Plaintiff class consists of the City's non-minority applicants from the May 18, 1992 eligibility list[19] who claim that the *Shield* Amended Consent Decree unconstitutionally prevented them from being hired for the patrol officer position. More specifically, Plaintiffs are comprised of two sub-classes. Sub-class A, numbering approximately 700, consists of applicants who allege that as a result of the City's hiring pursuant to the *Shield* Amended

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19 On December 15, 1994, Plaintiffs filed a Motion to Certify the class action, which was not opposed by the City; and on February 23, 1995, the Court granted Plaintiffs' Motion to Certify.

Consent Decree, they were never considered for the patrol officer position, even though minority candidates who ranked lower on the eligibility list were considered for that position. Sub-class B consists of approximately 300 applicants that were considered for the patrol officer position, but whom the City purportedly rejected based upon qualifications that were not applied to the hired minority applicants who were lower on the eligibility list. As with the *Shield* case, Judge Thomas was originally assigned to preside over this matter.

In addition to the Complaint, Plaintiffs also filed a Motion for Temporary Restraining Order and for a Preliminary Injunction. At an oral hearing on the Motion, Plaintiffs argued that injunctive relief was necessary to prevent the appointment and hiring of police officers based upon the 1992 eligibility list. Judge Thomas denied Plaintiffs' Motion, however, finding that immediate relief was not warranted under the facts and circumstances of the case.

In denying such relief, Judge Thomas considered whether Plaintiffs had established that the minority hiring preferences in the Amended Consent Decree deprived them of any basic constitutional rights. Upon reviewing the United States Supreme Court's decisions in *City of Richmond v. J.A. Croson Company* and *Local No. 93 v. City of Cleveland*, and the Sixth Circuit Court of Appeals' decisions in *United Black Firefighters Assoc. v. Akron* and *Vanguards of Cleveland v. City of Cleveland*, Judge Thomas concluded that "this Court in its consent decrees and in the several adjudications that preceded the 1977 consent decree made numerous findings of past discrimination."[20] (Doc. #

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20 While Judge Thomas discusses "*Vanguards I*" and "*Vanguards 2*" in his ruling on Plaintiffs' Motion for TRO, this Court presumes Judge Thomas is referring to the Supreme Court's decision in *Local*

79, Ex. N at 117-19). As such, unlike in *Croson* and *United Black Firefighters,* Judge Thomas concluded that "this Court's past discrimination predicate" served as a "constitutional basis for the hiring preference that [he] imposed in the 1977 order and again in the amended December 21, 1984 order." *Id.* Consequently, Judge Thomas denied Plaintiffs' Motion on that basis as well.

On June 3, 1994, Plaintiffs filed a First Amended Complaint. The Amended Complaint sets forth the following causes of action: (1) violations of the Civil Rights Act of 1871, 42 U.S.C. §§ 1981, 1983, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; (2) violations of the Civil Rights Act of 1871, § 1983, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution; (3) violations of the Civil Rights Act of 1871, § 1985(3), and the Equal Protection and Due Process clauses; (4) violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; and (5) violation of Ohio's common law of fraud. In their Amended Complaint, Plaintiffs request a preliminary and permanent injunction as well as declaratory relief, front and back pay, compensatory and punitive damages, and attorney's fees and costs.

On July 25, 1994, the Shield Club filed a Motion to

No. 93, supra, and the Sixth Circuit's decision in *Vanguards of Cleveland, supra*, respectively.

The decisions referenced above are cited as follows: *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 109 S.Ct. 706 (1989); *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 106 S.Ct. 3063 (1986); *United Black Firefighters Assoc. v. City of Akron*, 976 F.2d 999 (6th Cir. 1992); and *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013 (6th Cir. 1994). Both the original Consent Decree of 1977 and the Amended Consent Decree of 1984 preceded these cases.

Intervene as defendants. Judge Thomas granted the Motion, and the Shield Club thus became an intervening party-defendant in this lawsuit. The Shield Club filed a Motion to Dismiss on December 15, 1995, arguing that Plaintiffs lacked standing to challenge the Amended Consent Decree in the *Shield* case because their interests were adequately represented throughout that litigation. Subsequently, the City filed a Motion for Summary Judgment requesting, also, that the Court find that Plaintiffs lacked standing to pursue their claims against Defendants. Following opposition by Plaintiffs, Judge Thomas granted the Shield Club's Motion to Dismiss, as well as the City's Motion for Summary Judgment. In doing so, Judge Thomas found that this Court previously determined that Plaintiffs' interests were adequately represented by the FOP and/or the CPPA in the *Shield* case. Accordingly, Judge Thomas dismissed the instant case on July 24, 1996.

Plaintiffs filed a timely notice of appeal of this decision to the United States Court of Appeals for the Sixth Circuit. In a March 4, 1998 decision, the Sixth Circuit held that the FOP, which had been party to the *Shield* case, had no commonality of interest or injury with the non-minority applicants in this case; and thus, the within Plaintiffs were not prevented by the Civil Rights Act of 1991 from bringing their current action. Therefore, the Sixth Circuit reversed Judge Thomas' decision as to Plaintiffs' standing to bring this lawsuit, and remanded the case to this Court for further proceedings consistent with its decision. On remand, the undersigned Judge was assigned to preside over the remainder of the case.

This Court permitted the exchange of additional discovery between the parties. Following such subsequent discovery, on June 1, 2000, Plaintiffs filed a Motion for Partial Summary Judgment as to Counts One and Four of the Amended Complaint. (Doc. # 77) On the same date,

Defendants filed a cross-Motion for Summary Judgment with respect to the same issues. (Doc. # 79) Those motions are currently before the Court for review.

C. The Statistical Evidence

In addition to examining the procedural posture of the *Shield* case as it is relevant to the instant matter, this Court finds it necessary to explore the statistical background giving rise to those cases. That is, in ruling on the instant motions, it is necessary for the Court to review the statistical evidence presented by both parties in support of their respective positions. This inquiry necessarily requires the Court to examine the statistics presented in the context of the *Shield* case, as well as those presented in the instant matter. The Court now examines the statistical evidence in the *Shield* case and in the instant case respectively.

1. The *Shield* Case

As this Court previously addressed in this Memorandum Opinion and Order, Judge Thomas issued several orders throughout the life of the *Shield* case. In these orders, Judge Thomas made certain findings of discrimination with regards to the various personnel practices of the CPD. Judge Thomas based his findings of discrimination on the "historic evidence" in the record, which he found to warrant the use of race-conscious classifications. *Shield Club*, No. C72-1088 at *4 (N.D. Ohio filed Dec. 21, 1972).

In finding discrimination in the various aspects of CPD's personnel practices, Judge Thomas relied upon evidence in the form of statistics compiled by the U.S. Commission on Civil Rights in hearings relative to the City of Cleveland, as well as on 1970 U.S. Census data. These statistics revealed that, in 1966, the CPD consisted of a total

of 2186 police officers. Of those officers, only 135 were Black, accounting for a mere 6.2% of the total officers employed by the CPD that year. Furthermore, just one of the 2186 officers employed by the CPD was of Puerto Rican decent.

By November 21, 1972, the number of police officers employed by the CPD increased to a total of 2299. Of those 2299 officers, only 186 were Blacks. Thus, at that time, Blacks accounted for only 8.1% of the total number of the CPD's officers. As in 1966, the CPD employed just one officer of Puerto Rican decent.

Based upon these figures, the statistical evidence suggested only a slight increase in the CPD's employment of minority officers from 1966 until 1972. Moreover, such an increase appeared to be quite minimal when compared to the rapid growth of the minority population in the City of Cleveland during the same time period. For example, when Plaintiffs commenced the *Shield* case in 1972, the total population in Cleveland was 750,903 people. Of those 750,903 people, a total of 458,084 were Caucasians, and a total of 287,841 were Blacks. Thus, Blacks amounted to 38.3% of the City's total population in 1972, while amounting to only 8.1% of CPD's officers during the same year.

By the end of 1972 and in the beginning of 1973, upon the issuance of Judge Thomas' first of several orders in the *Shield* case, the minority presence within the CPD was still less than 10%, despite the fact that the Black and Hispanic populations within the City of Cleveland continued to grow. For instance, on October 1, 1973, the CPD employed a total of 2437 police officers, of which only 216 of those officers were minorities. Hence, minorities amounted to approximately 8.85% of all of the CPD's officers. This 8.85% included 194 new minority recruits

appointed by the CPD in compliance with the Order issued by Judge Thomas in 1972.

Also worth noting is that around the same time, Cleveland's Spanish-speaking population amounted to 13,972 people, or 1.86% of the total population. Based upon such statistics, in an Order issued on July 6, 1974, Judge Thomas recognized that the CPD employed only four Hispanics, three of whom it was required to appoint in compliance with the 1972 Order. *Shield Club*, No. C72-1088 at *1 (N.D. Ohio filed July 6, 1974). This number was equivalent to a Hispanic population of .16% within the total population of the CPD. Accordingly, Judge Thomas found discrimination to be present in the CPD's screening procedures based upon this information.

In 1976, Judge Thomas again noted a marked under-representation of minority officers in the CPD. *Shield Club*, No. C72-1088 at *9 (N.D. Ohio filed Sept. 27, 1976). Such under-representation prompted Judge Thomas to find discrimination in the assignments and transfers of police officers. In finding this presence of discrimination, Judge Thomas reviewed the racial composition of the people residing in Cleveland's six police districts. The districts were divided as follows: (1) District 1 (west of the Cuyahoga River) - 2% Blacks; (2) District 2 (west of the Cuyahoga River) - 1% Blacks ; (3) District 3 (east of the River) - 40% Blacks; (4) District 4 (east of the River) - 59% Blacks; (5) District 5 (east of the River) - 82% Blacks; and (6) District 6 (east of the River) - 54% Blacks. As revealed by the 1970 U.S. Census, almost all of Cleveland's Black population resided east of the Cuyahoga River.[21] The record reflects

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[21] The 1973 U.S. Census update lists Cleveland's population as 678,615, which is down from the 1970 U.S. Census figure of 750,903. In his 1976 Order, however, Judge Thomas used the population percentage figures from the data from the 1970

that prior to January 1, 1968, the CPD did not assign any minority personnel to the almost entirely Caucasian 1st and 2nd Districts, which were west of the Cuyahoga River. In fact, in the years 1962 through 1967, the CPD only assigned minority personnel to the districts with a substantial population of Blacks. Following the election of Carl B. Stokes, Cleveland's first black mayor, in November 1967, however, the CPD assigned six minority patrol officers to both the 1st and 2nd Districts. In addition, the CPD assigned approximately the same number of minority patrol officers to those districts through January 1, 1972.

After January 1, 1972, however, the number of minority personnel in those districts declined. This decline took place despite an increase in the total number of minority personnel within the CPD in 1973. By June 1, 1976, there were two minority officers in the 1st District and no minority officers in the 2nd District. Meanwhile, the number of Caucasian officers in these same districts had risen to 148 in the 1st District and 186 in the 2nd District. During this same time period, "substantial numbers of minority officers were being assigned to the 4th, 5th, and 6th Districts, which ha[d] sizeable minority populations." *Id.* at *10.

2. *Janell Rutherford, et al.*

In the instant case, both Plaintiffs and Defendants present statistical data upon which they base their contentions. Defendants present evidence of the yearly distribution of minority and non-minority police officers within the CPD. (Doc. # 79, Ex. C, E) In particular, Defendants present evidence in the form of an affidavit of Lieutenant Gerald Seger, the CPD's officer in charge of the Police Personnel Unit from February 1979 through the

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Census. *Shield Club*, No. C72-1088 at *9 (N.D. Ohio filed Sept. 27, 1976).

expiration of the 1992 Eligibility List on May 18, 1994. As part of his responsibilities as the officer in charge of personnel, Lieutenant Seger monitored the percentage of minorities employed by the CPD within this time period. (Lt. Gerald Seger Aff. ¶¶ 1,3). As such, Defendants present his testimony to confirm the alleged distribution of minorities during the relevant time period.

Plaintiffs, on the other hand, base their position that the Amended Consent Decree is invalid on the hiring distribution of police patrol officers. In that respect, Plaintiffs present evidence of the number of minority and non-minority officers actually hired by the CPD between 1985 and 1992, the life of the Amended Consent Decree. The Court examines the statistical information set forth by both parties relevant to the instant case.

The Distribution of Minority and Non-Minority Members

In 1977, the year the parties entered into the Consent Decree in the *Shield* case, the CPD consisted of 2023 members. (Doc. # 79, Ex. C) This number included 187 minority members, which was equivalent to a total 9.2% of the CPD. *Id.* In 1982, at the time the Consent Decree was originally scheduled to expire, the CPD consisted of a total of 1981 members, which included 391 minorities. *Id.* This brought the percentage of minority members up to 19.7% of the CPD, thus raising the total to approximately 10.5% in five years. *Id.* At the time that Judge Thomas extended the Consent Decree until December 31, 1984 (upon joint motion of the parties), however, the CPD had 1814 members of which 379, or 20.8%, were minorities. *Id.* Thus, the City had not met its goals established as in the Consent Decree.

Based upon the continued need for judicial supervision with respect to the City's hiring procedures, the *Shield* parties entered into the Amended Consent Decree. As

previously discussed in this Memorandum Opinion and Order, the Amended Consent Decree was scheduled to expire on December 31, 1992 or when the CPD had achieved 33% minority membership, whichever came first. The following figures are relevant to the life of the Amended Consent Decree:

Table 1

Year	Total Members	# of Minority Members	% of Minority Members
1985	1736	385	22.2%
1986	1736	383	22.1%
1987	1692	385	22.8%
1988	1713	411	24.0%
1989	1737	435	25.0%
1990	1743	458	26.3%
1991	1719	483	28.1%
1992	1713	507	29.6%
1993	1641	499	30.4%
January 1994	1691	540	31.9%
July 1994	1741	577	33.1%
1995	1741	587	33.7%

Id., Ex. C, E. Because the CPD had not hired a minimum number of 70 patrol officers in 1986 and again in 1991, as mandated by the Amended Consent Decree, the Amended Consent Decree remained in effect after 1992, its scheduled expiration. As the above figures demonstrate, the minority membership of the CPD achieved 33% in or about July of 1994, at which time Judge Thomas terminated the Decree. *Id.*

The Hiring Distribution

Plaintiffs contend that the use of racial preferences in the instant case was unnecessary because the CPD, on an average, hired more minorities between 1985 and 1992 than required by the terms of the Amended Consent Decree. In support of their position, Plaintiffs present data concerning the actual number of minority and non-minority officers hired by the CPD from 1985 through 1992. That data is as follows:

Table 2

Year	# of New Hires	# of Non-Minority Hires	# of Minority Hires	% of Minority Hires
1985	93	51	42	45%
1986	48	23	25	52%
1987	96	54	42	44%
1988	102	56	46	45%
1989	109	61	48	44%
1990	80	45	35	44%

Year	# of New Hires	# of Non-Minority Hires	# of Minority Hires	% of Minority Hires
1991	64	37	27	42%
1992	85	48	37	44%

(Defendants' Admissions, Req. # 22-25; 27-30). Thus, in using the figures above, Plaintiffs calculate the total number of minorities hired between 1985 and 1992 (the years encompassed in the Amended Consent Decree) as 302; the total number of non-minorities as 375; which numbers provide for a total of 677 new hires. As such, Plaintiffs propose that such figures demonstrate that from 1985 through 1992, the CPD hired an average of 84.62 police patrol officers (minority and non-minority officers) per year.

Applicant Flow Data

The record in the instant case also contains certain applicant flow data, which is maintained by the CPD. Such data is arguably used to reflect the labor market for the patrol officer position.[22] (Doc. # 77 at 19) This applicant flow data is summarized in a "Final Report on the Development and Administration of the 1992 Entry Level Police Examination for the City of Cleveland," by Norman D. Henderson, PhD. *Id.*, Ex. 4. More specifically, Table 6 of that report examines

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22 In order to determine whether race-conscious remedies are appropriate, courts review, among other factors, the relationship of the numerical goals of the particular remedy, in this case the hiring ratio determined in the consent decrees, to the relevant labor market (or relevant work force). *See United States v. Paradise*, 480 U.S. 149 (1987). This relationship will be addressed later in this Memorandum Opinion and Order.

the results of the 1992 entrance examination for the patrol officer position administered by the CPD. *Id.* The report reflects that, in 1992, 2035 non-minorities applied for the patrol c[illegible]r position; of that number, only 1521 applicants took the examination; and 1257 passed and thus gained a position on the 1992 eligibility list. *Id.* In contrast, the report demonstrates that in the same year, 1498 minorities applied for the position; of those individuals, only 1079 took the examination; and 554 passed. *Id.* In comparing the 1257 non-minority applicants who passed the examination to the 554 minority applicants who passed the examination, the report reveals that 30.6% of those who are qualified, in terms of passing the examination, were minorities during that year. *Id.*

Qualified Labor Pool

In examining statistical evidence in a case such as this, courts must also consider the racial composition of the "qualified labor pool." *See Aiken v. City of Memphis*, 37 F.3d 1155, 1163 (6th Cir. 1994). The qualified labor pool, in this case, consists of those individuals who are qualified for the position of police patrol officer. *See id.; Hazelwood School Dist. v. United States*, 433 U.S. 299, 308-09 (1977).

According to Defendants, the qualified labor pool is based on the percentage of minorities who took the entrance examination for the patrol officer position. Plaintiffs, however, claim that the qualified labor pool is based on the percentage of minorities who actually passed the entrance examination for the patrol officer position. Although Defendants set forth expert testimony in support of their position concerning the definition of the qualified labor pool, Plaintiffs fail to provide any such evidence to this Court, despite being given an opportunity to do so upon remand.

In support of their definition of qualified labor pool,

Defendants set forth the expert testimony of Dr. Gerald V. Barrett. (Doc. # 79, Ex. S) In his sworn affidavit, Dr. Barrett states the following:

> In reviewing the Henderson (July 14, 1993) Final Report on the Development and Administration of the 1992 Entry Level Police Examination for the City of Cleveland, I determined that the applicant pool was 57.6% White and 40.9% Minority. For the 1989 CPD Examination, the applicant pool was 47.6% White and 52.3% Minority. These percentages are based on the minimum qualifications for age, education, and actually taking the examination. These additional qualifications for the 1992 examination were (1) physical abilities examination, (2) drug screening, (3) background investigation, (4) psychological evaluation, and (5) medical examination. Information was not available concerning those additional selection procedures. In my professional opinion, the most appropriate estimate of the relevant applicant pool for the 1992 CPD Police Entrance Examination is the White and Minority percentages of those who actually took the examination.

Id. ¶¶ 5-6.

Based upon this expert testimony, Defendants provide this Court with a comparison chart demonstrating the disparities in the relevant figures under the parties' respective definitions of the qualified labor pool. In particular, the chart compares the percentage or number of qualified applicants under Defendants' definition of the qualified labor pool, as opposed to Plaintiffs' definition. It then demonstrates how those figures compare to the total number of minorities in the work force for certain specified years. The chart is as follows:

Year	% of Minorities Who Qualified to Sit For & Took the Entrance Examination (Defendants' Qualified Labor Pool)	% of Minorities Who Passed Civil Service Test (Plaintiffs' Qualified Labor Pool)	% of Minorities in the Work Force
1982	49.10%	47.30%	19.70%
1989	52.30%	45.60%	25.00%
1992	41.50%	30.60%	29.60%
1994	41.00%	33.70%	31.90%

Year	# of Individuals Who Qualified for and Took Entrance Examination	# of Individuals Who Passed Entrance Examination	# of Minorities Who Qualified to Sit For and Took Entrance Examination	# of Minorities Who Passed the Civil Service Test
1982	2378	2213	1167	1046
1989	1584	1343	828	612
1992	2600	1811	1079	554
1994	2950	2500	1207	843

(Doc. # 84 at 4) Defendants contend, as evident by the

comparison chart, that even using Plaintiffs' definition of qualified labor pool (those who actually passed the examination), the hiring ratio and workforce composition goals are related to the relevant labor market, and thus, the Amended Consent Decree was constitutionally valid.

II. STANDARD OF REVIEW

Summary judgment is appropriate when the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The burden of showing the absence of any such "genuine issue" rests with the moving party:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (citing FED. R. CIV. P. 56(c)). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. The court will view the summary judgment motion in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Summary judgment should be granted if a party who

bears the burden of proof at trial does not establish an essential element of their case. *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 941 (6th Cir. 1995) (citing *Celotex*, 477 U.S. at 322). Accordingly, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995) (citing *Anderson*, 477 U.S. at 252). Moreover, if the evidence presented is "merely colorable" and not "significantly probative," the court may decide the legal issue and grant summary judgment. *Anderson*, 477 U.S. at 249-50 (citations omitted). In most civil cases involving summary judgment, the court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252. However, if the non-moving party faces a heightened burden of proof, such as clear and convincing evidence, it must show that it can produce evidence which, if believed, will meet the higher standard. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmover. The nonmoving party may not simply rely on its pleadings, but must "produce evidence that results in a conflict of material fact to be solved by a jury." *Cox v. Kentucky Dep't of Transp.*, 53 F.3d 146, 149 (6th Cir. 1995). FED. R. CIV. P. 56(e) states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that

there is a genuine issue for trial.

The Federal Rules identify the penalty for the lack of such a response by the nonmoving party as an automatic grant of summary judgment, where otherwise appropriate. *Id.*

Though parties must produce evidence in support of and in opposition to a motion for summary judgment, not all types of evidence are permissible. The Sixth Circuit has concurred with the Ninth Circuit that "'it is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment.'" *Wiley v. United States*, 20 F.3d 222, 225-26 (6th Cir. 1994) (quoting *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988)). FED. R. CIV. P. 56(e) also has certain, more specific requirements:

> [Rule 56(e)] requires that affidavits used for summary judgment purposes be made on the basis of personal knowledge, set forth admissible evidence, and show that the affiant is competent to testify. Rule 56(e) further requires the party to attach sworn or certified copies to all documents referred to in the affidavit. Furthermore, hearsay evidence cannot be considered on a motion for summary judgment.

Wiley, 20 F.3d at 225-26 (citations omitted). However, evidence not meeting this standard may be considered by the district court unless the opposing party affirmatively raises the issue of the defect.

> If a party fails to object before the district court to the affidavits or evidentiary materials submitted by the other party in support of its position on summary judgment, any

> objections to the district court's consideration of such materials are deemed to have been waived, and [the Sixth Circuit] will review such objections only to avoid a gross miscarriage of justice.

Id. at 226 (citations omitted).

As a general matter, the district judge considering a motion for summary judgment is to examine "[o]nly disputes over facts that might affect the outcome of the suit under governing law." *Anderson*, 477 U.S. at 248. The court will not consider non-material facts, nor will it weigh material evidence to determine the truth of the matter. *Id.* at 249. The judge's sole function is to determine whether there is a genuine factual issue for trial; this does not exist unless "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.*

In sum, proper summary judgment analysis entails "the threshold inquiry of determining whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250. It is with this standard in mind that the instant motions must be decided.

III. DISCUSSION

In this case, Plaintiffs essentially contest the validity of the extension of the Amended Consent Decree into 1994. More specifically, Plaintiffs claim that the alleged improper extension of the Amended Consent Decree into 1994 means that the City used an invalid 1992 eligibility list in reviewing their applications for the patrol officer position during that

year.[23] Accordingly, Plaintiffs contend that the Amended Consent Decree was no longer in effect during the 1992 patrol officer selections and thus improperly resulted in less qualified minority applicants being hired for that position. Plaintiffs further contend that the Amended Consent Decree's length and method of selection of patrol officers are unlawful.

Plaintiffs make this argument by looking to the Supreme Court's decisions in *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 109 S.Ct. 706 (1989) and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S.Ct. 2097 (1995). More specifically, Plaintiffs state that because Judge Thomas failed to make the specific constitutional findings required by the Supreme Court in *Croson* in 1989, and later reiterated in *Adarand*, the continued

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23 Pursuant to the Amended Consent Decree, eligibility lists have a life of two years. (Doc. # 79, Ex. K ¶ 4(c)).

implementation of the Amended Consent Decree until 1994 was not constitutionally valid. It is Plaintiffs' contention that had the parties attempted to develop the type of findings required by *Croson*, Judge Thomas would have found that the extension of that agreement did not amount to a racial classification that was justified by a compelling governmental interest, nor was it narrowly tailored to the achievement of that interest under the relevant case law. As such, Plaintiffs argue that the extension of the Amended Consent Decree was unconstitutional.

A. The Evolution of the Applicable Law

In light of Plaintiffs' argument that Judge Thomas made his decisions in the *Shield* case without consideration of the applicable Supreme Court precedent, this Court now examines the evolution of the legal landscape applicable to the issue before it. In doing so, the Court first looks to the relevant decisions made by the Supreme Court. Next, the Court turns to applicable decisions made by the United States Court of Appeals for the Sixth Circuit.

1. The Supreme Court Developments

This Court finds it most logical to begin its examination of this nation's constitutional jurisprudence concerning race-conscious measures with the Supreme Court's decision in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), which was the law of the land at the time that the *Shield* Plaintiffs commenced the lawsuit against the CPD. In *Griggs*, the Supreme Court addressed the issue of whether an aptitude test and high school graduation requirement used by an employer to hire employees was lawful when it had a disparate impact on minority applicants. *Id.* at 426. When faced with this issue, for the first time, the Supreme Court adopted the disparate impact concept of discrimination as the theoretical framework for enforcing

Title VII. *Id.* at 431. The Supreme Court held that when the consequences of employment practices, such as the use of the aptitude test and the high school graduation requirement, result in a disparate impact that operates to exclude minorities, the employer must demonstrate that the practices are job-related. *Id.* In the absence of a showing that the practices are job-related, the Supreme Court held that such practices violate Title VII. *Id.*

Thus, around this time, the concept of affirmative action was on its way to becoming a relatively well-known concept in society at large. Generally, affirmative action refers to policies that directly or indirectly award employment, admission to schools, and other resources to individuals on the basis of membership in designated protected groups, in order to compensate them for past societal discrimination. In the wake of *Griggs*, for example, employers falling within the scope of Title VII began engaging in preferential practices, such as quotas. These preferential practices, however, led to lawsuits by non-minority plaintiffs claiming that they were discriminated against on the basis of race.

One such case considered by the Supreme Court was *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In that case, the Supreme Court considered an equal protection challenge to a medical school affirmative action plan brought by a non-minority student claiming race discrimination. *Id.* at 278. The plan in question reserved sixteen of the one hundred openings available for new medical students for minorities. *Id.* at 289. In a five to four decision, the Supreme Court held that such a plan was unconstitutional because it consisted of an absolute quota, rather than merely using race as a legitimate factor that may be considered along with other admissions criteria. *Id.* at 266-67.

However, approximately one year later, in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Supreme Court approved a race-based quota without a finding of illegal practices by the employer. In broadening the scope of the permissible use of affirmative action, the Supreme Court denied the Title VII discrimination claim brought by a non-minority employee with respect to the race-based quota. *Id.* at 208. As such, the Supreme Court held that the 50% racial quota was legal and not in violation of Title VII. *Id.* at 209.

Throughout the 1980s, the Supreme Court continued to expand the scope of affirmative action in cases such as *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (holding that a finding of unlawful discrimination is not a predicate for permissible racial preference), *Local 28 Sheet Metal Workers International Association v. Equal Opportunity Commission et al.*, 478 U.S. 421 (1986) (reaffirming the legality of racial quotas), and *Local 93 International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) (upholding a consent decree between the City and minority employees which provided for race-based quotas to be used for promotions). In 1986, however, the Supreme Court decided *Wygant, et al. v. Jackson Board of Education et al.*, 476 U.S. 267 (1986), which suggested that the pendulum was swinging back toward a more restrictive approach to race-conscious remedies.

In *Wygant*, the Supreme Court faced the question of whether a school board, consistent with the Equal Protection Clause, could extend preferential protection against layoffs to certain employees on the basis of their race or national origin. *Id.* at 269-70. The alleged purposes for this measure were to combat societal discrimination and to provide minority role models for minority students. *Id.* at syllabus para. (b). In addressing this issue, the Supreme Court noted that "[r]acial and ethnic distinctions of any sort are

inherently suspect and thus call for the most exacting judicial examination." *Id.* at 273 (quoting *Bakke*, 438 U.S. at 291). Accordingly, "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Id.* at 273-74. Based upon this proposition, the Justices agreed that some level of heightened scrutiny should apply to racial classifications made for remedial purposes.

The Justices in *Wygant*, however, were not able to reach a consensus with respect to the precise level of heightened scrutiny that should be applied in such instances. More specifically, Justices Marshall, Brennan, and Blackmun found that racial classifications used for remedial purposes are constitutional if they serve important governmental objectives and are substantially related to the achievement of those objectives, while Justice Stevens stated that the proper measure is whether the "public interest, and the manner in which it is pursued, justifies any adverse effects on the disadvantaged group." *Id.* at 301, 313. Despite these differing positions, the four Justices who comprised the *Wygant* plurality found that societal discrimination alone was insufficient to justify the racial classifications, and such classifications were only permissible to the extent that they remedy a showing of past discrimination by the governmental entity in question. *Id.* at 274-76. Therefore, the plurality agreed that the means by which the government advanced racial preferences must comply with strict scrutiny. *Id.* at 274, 285.

Strict scrutiny requires the court to conduct a two-step analysis to determine if the particular race-conscious classification passes constitutional muster. *Id.* First, the court must determine if the racial classification is justified by a compelling governmental interest. *Id.* Next, the court must examine whether the means chosen by the government

to effectuate its purpose are narrowly tailored to the achievement of that goal. *Id.* In applying this standard to the case before it, the *Wygant* plurality found that the school board policy violated the Fourteenth Amendment of the Constitution because it was not sufficiently narrowly tailored. In particular, the Court found that less intrusive means of accomplishing a similar purpose, such as adoption of hiring goals, were available. *Id.* at 283-84.

In the wake of the *Wygant* decision, amidst remaining uncertainty in the circuit courts as to the applicable standard of review for race-conscious classifications, the Supreme Court decided the case of *United States v. Paradise*, 480 U.S. 149 (1987). In *Paradise*, the Supreme Court squarely acknowledged that it "ha[d] yet to reach consensus on the appropriate constitutional analysis applicable to race-conscious classifications." *Id.* at 166. Despite this acknowledgment, however, the *Paradise* Court refrained from establishing the appropriate standard because it concluded that the ordered relief in that case survived even strict scrutiny. *Id.* More specifically, the Supreme Court found that the requirement that black candidates receive 50% of the state trooper promotions in Alabama was justified by a compelling governmental interest in remedying discriminatory hiring and promotional practices within Alabama's Department of Public Safety and that it was narrowly tailored to accomplish that goal. *Id.* at 150-151, 169-171.

In reaching this decision, the Supreme Court shed additional light on the "narrowly tailored" aspect of the strict scrutiny analysis. In particular, the Supreme Court stated that courts considering whether a race-conscious remedy is narrowly tailored to serve a compelling governmental interest should examine the following factors: (1) the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief,

including the availability of waiver provisions; (3) the relationship of the numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of third parties. *Id.* at 171. Thus, the Supreme Court clearly delineated certain criteria from which courts could ascertain whether a particular remedy is narrowly tailored to serve its compelling purpose.

Even with this additional guidance offered by the *Paradise* Court, however, the standard applicable to a court's review of a race-conscious classification remained unclear until the Supreme Court rendered its landmark decision in *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989). *Croson* involved a challenge to a city ordinance that required general contractors who were awarded government construction contracts to subcontract a minimum of 30% of the amount of the contract to minority bidders. *Id.* at 469. In evaluating this challenge, the Supreme Court made the well-known pronouncement that the Fourteenth Amendment requires strict scrutiny to apply to all raced-based actions by governments on the state and local level. *Id.* at 493.

The Supreme Court explained that strict scrutiny was appropriate based upon the fact that the ordinance in question denied certain citizens the opportunity to compete for a percentage of government construction contracts based solely upon their race. *Id.* The Supreme Court also stated, "We . . . reaffirm the view expressed by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification." *Id.* at 494. As such, the Supreme Court held that an application of strict scrutiny mandates the demonstration of a firm evidentiary basis for the conclusion that the under-representation of minorities was a product of past discrimination, regardless of whether a particular plan is remedial or benign in nature. *Id.* at 493.

In applying the strict scrutiny standard to the facts of *Croson*, the Supreme Court found that the city failed to establish "a strong basis in evidence for its conclusion that remedial action was necessary." *Id.* at 500. When addressing the type of evidence deemed appropriate for establishing that the action in question is necessary, the Court made clear that in situations where special qualifications are necessary, the relevant statistical pool is the number of minorities qualified to do the job. *Id.* at 501-02. This is also known as the qualified labor pool. *Id.* Because the city failed to set forth any evidence concerning the qualified labor pool or otherwise demonstrated the need for the race-conscious classification, the Supreme Court held that the city failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. *Id.* at 505.

The Supreme Court in *Croson* also noted that it was virtually impossible to assess whether the action was narrowly tailored to remedy prior discrimination in light of the fact that it was not linked to identified discrimination. *Id.* at 507. The Supreme Court further stated that the city apparently failed to consider any race-neutral alternatives to increase minority involvement in government construction, and the 30% quota was "completely unrealistic," based upon its assumption that minorities would enter the construction industry in numbers proportionate to their representation in the general population. *Id.* at 507-08. Therefore, because the city failed to demonstrate the compelling need for awarding a certain percentage of its construction contracts to minorities, and failed to demonstrate that the race-based plan at issue was narrowly tailored to achieve that interest, the Supreme Court found that it violated the dictates of the Equal Protection Clause of the Fourteenth Amendment to the Constitution. *Id.* at 511.

In 1990, however, the Supreme Court appeared to retreat from the conservative approach toward affirmative action brought about by the *Croson* decision. In *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990), the Supreme Court found that defendant's policy of favoring minority broadcasters as required by Congress was substantially related to the achievement of the important governmental objective of diversity in broadcasting. In reaching this holding, the Supreme Court focused on the future benefits of such preferential treatment, rather than finding that the plan in question was remedial in nature with regard to past discrimination. *Id.* at 549.

Several years after *Metro Broadcasting*, however, the pendulum swung back to a more conservative approach to affirmative action. In 1995, the Supreme Court further expanded the application of strict scrutiny to race-conscious programs in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). In reviewing a challenge to a federal program that contained racial classifications, the Supreme Court made clear that "all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny." *Id.* at 227. Thus, the *Adarand* Court established the requirement that federal racial classifications, like those of a state or local government, must serve a compelling interest and be narrowly tailored to further that interest in order to comply the Fifth Amendment to the Constitution. *Id.* Significantly, therefore, the Supreme Court overruled its prior decision in *Metro Broadcasting*. *Id.* at 231 (finding that "*Metro Broadcasting* undermined important principles of [the Supreme Court's] equal protection jurisprudence . . .").

Based upon the development of the law applicable to race-conscious classifications prompted by these Supreme Court decisions, the Sixth Circuit decided several cases

concerning race-conscious remedies arising in the context of a consent decree. Thus, this Court examines those Sixth Circuit cases to the extent that they are relevant to Plaintiffs' challenge to the extension of the Amended Consent Decree into 1994.

2. The Sixth Circuit Cases

In 1993, the Sixth Circuit decided *Detroit Police Officers Association v. Young*, 989 F.2d 225 (6th 1993), which involved a challenge to a municipal police department's affirmative action plan established in a consent decree. In *Young*, the Sixth Circuit made clear that "[r]acial classifications and plans, even if approved as a part of a consent decree, 'are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be necessary . . . to the accomplishment of their legitimate purpose.'" *Id.* at 227 (quoting, in part, *Palmore v. Sidoti*, 446 U.S. 429, 432-33 (1984)). As such, the Sixth Circuit held that a challenged race-conscious classification that arises in the context of a consent decree is subject to strict scrutiny. *Id.* (citing *Croson*, 488 U.S. at 493-94).

The following year, the Sixth Circuit, again, made clear that strict scrutiny shall apply to a court's review of a race-conscious classification that arises in the context of a consent decree. In *Aiken, et al. v. City of Memphis, et al.*, 37 F.3d 1155, 1161 (6th Cir. 1994), the Sixth Circuit looked to the Supreme Court's decisions in *Wygant* and *Croson* for guidance concerning the propriety of an application of strict scrutiny to the promotional remedies contained in the parties' consent decree. *Id.* In holding that a judicially approved decree is not entitled to a lesser standard of review, the Sixth Circuit referred to its prior statement that "*Croson* simply does not exempt consent decrees from its requirements." (quoting *United Black Firefighters Ass'n v.*

City of Akron, 976 F.2d 999, 1008 (6th Cir. 1992)). Therefore, the Sixth Circuit utilized the strict scrutiny standard in determining whether the race-conscious measure was constitutional.

Also in 1994, in addition to addressing the issue of the application of strict scrutiny, the Sixth Circuit examined the issues raised by a district court's extension of a consent decree in *Vanguards of Cleveland, et al. v. City of Cleveland*, 23 F.3d 1013 (6th Cir. 1994). In that case, the City of Cleveland entered into an amended consent decree with the Vanguards, an association of black and hispanic firefighters in Cleveland. *Id.* The parties reached the amended consent decree in order to address, *inter alia*, the Vanguards' grievance that "the City had discriminated, both in policy and practice, against minority firefighters on the basis of race in promotions to the positions of lieutenant, captain, battalion chief, and assistant chief, all of which [were] supervisory positions in the City's Division of Fire." *Id.* On January 31, 1983, after conducting hearings on the issue, the district court approved the amended consent decree entered into by the parties. *Id.* at 1016. The amended consent decree provided that the remedies set forth therein were to be in force until November of 1987. *Id.*

In November of 1987, the Vanguards filed a motion for an extension of the amended consent decree. *Id.* In their motion, the Vanguards argued that an extension was necessary for two reasons: (1) the overall goals of the amended consent decree had not been achieved; and (2) "the 1984 and 1985 promotional examinations given by the City were discriminatory." *Id.* As a result, in June 1992, the Vanguards and the City entered into a proposed "Stipulation and Order," which recommended that certain modifications be made to the amended consent decree. *Id.* Among these modifications was the recommendation that the amended consent decree be extended for "approximately two

more years with one-for-one promotions of minorities and non-minorities until all qualified minorities had been promoted, which would continue for the duration of the eligibility lists from the 1988 examination." *Id.* On November 25, 1992, the district court accepted the Stipulation and Order proposed by the parties. *Id.* at 1017. Thereafter, an intervenor union, the International Association of Firefighters Local Number 93, appealed the district court's approval of the modification to the Sixth Circuit. *Id.*

In examining this issue, the Sixth Circuit stated the following concerning consent decrees:

> A consent decree is a strange hybrid in the law. It is both a voluntary settlement agreement which could be fully effective without judicial intervention and a final judicial order . . . plac[ing] the power and prestige of the court behind the compromise struck by the parties. Hence, a consent decree is a settlement agreement subject to judicial policing. Accordingly, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it or by what might have been written had the plaintiff established his factual claims and legal theories in litigation. However, a consent decree should be construed to preserve the position for which the parties had bargained.

Id. (internal quotations and citations omitted). In resolving the appeal, the Sixth Circuit affirmed the decision of the district court and thus found that the district court did not abuse its discretion in approving the modification to the amended consent decree. *Id.* at 1021-22. In doing so, the Sixth Circuit recognized that the district court's decision to approve the extension had its basis in the express terms of the amended consent decree and its inherent power to modify

such an agreement to effectuate its purposes. *Id.*

Based upon these cases, it is clear that this Court must analyze the extension of the Amended Consent Decree at issue in the instant matter under the strict scrutiny standard of review. In applying this standard, the Court recognizes that it possesses the inherent power to grant an extension of an amended consent decree to achieve the compelling interest, even in the absence of an agreement to extend by the parties. It is with these standards in mind that the Court conducts the analysis required by strict scrutiny. Before doing so, however, the Court briefly addresses the relevant burden of proof.

B. The Burden of Proof

The Sixth Circuit set forth the relevant burden of proof in *Aiken, et al. v. City of Memphis, et al.*, 37 F.3d 1155, 1162 (6th Cir. 1994). In that case, the Sixth Circuit stated that when a race-conscious plan is subjected to strict scrutiny, the party defending the plan bears the burden of producing evidence that the plan is constitutional. *Id.* If that burden is satisfied, then the party challenging the plan retains the ultimate burden of proving its unconstitutionality. *Id.*

In this case, the parties agree that the burden as set forth by the Sixth Circuit in *Aiken* is most suitable to this Court's analysis of the issues involved in the case at bar. (Doc. # 79 at 10; Doc. # 81 at 2) With respect to this issue, Plaintiffs state the following in their Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment:

> Plaintiffs have already accepted the allocation of the burdens of proof that the City of Cleveland raises in their brief. Therefore, both parties agree that the Defendants must meet the burden of production of

> establishing a compelling interest to impose race based preferences on the hiring from the 1992 eligibility list. The Plaintiffs then have the ultimate burden of proving the unconstitutionality of the 1984 Amended Consent Decree's application to the selection from the 1992 eligibility list by showing the lack of a compelling interest to impose race based preferences on the hiring and/or that the plan was not narrowly tailored in light of unusual [c]onstitutional and federal statutory prohibitions against using race in the selection of employees.

(Doc. # 81 at 2) Defendants, likewise, recognize that they bear the initial burden of production to demonstrate that the race-conscious remedy is supported by a "strong basis in evidence," while the "ultimate burden" rests on Plaintiffs to demonstrate the unconstitutionality of the race- conscious remedy. (Doc. # 79 at 10) Accordingly, this Court finds that the City bears the initial burden of producing evidence to demonstrate that it had a compelling interest in applying the race-conscious remedy. If this City meets this burden, only then must Plaintiffs demonstrate, by a preponderance of the evidence, that either the City did not have a compelling interest, or the use of the race-conscious remedy was not narrowly tailored to achieve that interest.[24]

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24 In making this finding, the Court recognizes that the Sixth Circuit, in *Middleton v. City of Flint*, 92 F.3d 396, 404 (6th Cir. 1996), indicated that a more weighty burden may be appropriately placed on the party defending the constitutionality of the race-conscious plan. In *Middleton*, the Sixth Circuit held that the party defending the plan "must prove that it had a compelling state interest when it enacted its plan, and that the plan is narrowly tailored to further that compelling state interest." *Id.* Subsequent to the *Middleton* decision, however, at least one court deviated from the standard as set forth by the Sixth Circuit when it stated that "placing the burden on the [party defending the constitutionality of the plan] would appear to be contrary to established Supreme Court precedent. . . ."

C. Strict Scrutiny Analysis

As an initial matter, the Court notes that, in bringing the instant action, Plaintiffs originally asserted that the City hired unqualified minorities to the position of patrol officer pursuant to the terms of the Amended Consent Decree. As such, this Court permitted Plaintiffs to conduct extensive discovery in order to obtain personnel files and employment records of minorities hired pursuant to the Amended Consent Decree in accordance with this theory. This extensive discovery, however, failed to produce any evidence to support Plaintiffs' original claim. Thus, upon completion of the discovery process, Plaintiffs altered their theory of the case and presented the Court with the issue that it currently considers: whether the application of the race-conscious remedy contained in the Amended Consent Decree, as applied to the 1992 eligibility list and thereafter, is constitutional.

Based upon this proposition, the issue relevant to the strict scrutiny analysis in this case involves the remedy contained in the Amended Consent Decree of 1984. (Doc. # 92 at 2-5) In challenging the remedy contained therein, however, Plaintiffs do not challenge the implementation of the remedy in 1984, nor do they challenge any factual or legal determinations made when the parties entered into the agreement that year. *Id.* Therefore, whether the remedy contained in the Amended Consent Decree was

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Ashton v. City of Memphis, 49 F. Supp.2d 1051, 1057 (W.D. Tenn. 1999). Here, both parties agree that the burden as set forth in *Aiken*, as opposed to *Middleton*, is most appropriate under the facts and circumstances of this case. Hence, the Court shall use the *Aiken* framework in resolving the instant cross-motions for partial summary judgment. In doing so, however, the Court notes that it would reach the same conclusion under either analysis.

constitutional in 1984 is not the issue before the Court. *Id.* Rather, the issue before the Court concerns a challenge to the City's use of the remedy contained within the Amended Consent Decree when selecting patrol officers in February 1993 from the May 18, 1992 eligibility list. *Id.* Broadly speaking, therefore, the issue before the Court is whether the remedy, as used in 1993 and thereafter, was constitutional. *Id.*

As this Court previously mentioned in this Memorandum Opinion and Order, strict scrutiny requires a two-step analysis to determine if a particular race-conscious remedy passes constitutional muster. *See Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 734 (6th Cir. 2000) (citing *Wygant*, 476 U.S. at 274). The first step requires the Court to determine if the race-conscious remedy is justified by a compelling governmental interest. *See id.* The second step requires the Court to then examine whether the race-conscious remedy is narrowly tailored to the achievement of that interest. *See id.* The Court now examines each step in turn.

1. Compelling Interest

With respect to the first step of the strict scrutiny analysis, the governmental entity in question must "identify precisely the compelling state interest that might be able to overcome the general presumption against racial classification." *Id.* That is, in order to demonstrate the compelling need for a race-conscious remedy, the governmental entity must do more than present mere speculation of past societal discrimination. *See id.* at 735. Rather, it is clear that the governmental entity must demonstrate a "strong basis in evidence for its conclusion that remedial action was necessary." *See id.* (calling the strong basis in evidence requirement the "linchpin of the *Croson* analysis").

A party may demonstrate a strong basis in evidence by establishing that a court or another competent body made a contemporaneous or antecedent finding of past discrimination. *See e.g.*, *Wygant*, 476 U.S. at 289 (J. O'Connor concurring in part and concurring in judgment) (agreeing with the plurality that contemporaneous or antecedent finding of past discrimination is one way to demonstrate a strong basis in evidence, but finding that it is "not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan"). In addition, a party may demonstrate a strong basis in evidence by producing evidence that approaches a prima facie case of a constitutional violation. *See Croson*, 488 U.S. at 500 (finding the race-conscious remedy unjustified because there was "nothing approaching a prima facie case of a constitutional or statutory violation" to support a conclusion that a remedial action was necessary). Moreover, the Sixth Circuit has explained how statistical data may be used in demonstrating past discrimination warranting a race-conscious remedy. *See United Black Firefighters Assoc. v. City of Akron*, 976 F.2d 999, 1011 (6th Cir. 1992). In *United Black Firefighters*, the Sixth Circuit stated:

> The method generally used [to demonstrate intentional discrimination] is to compare the minority percentage in the relevant statistical pool to the minority percentages in the group of persons selected for the positions at issue. The relevant statistical pool is comprised of all persons qualified for the position at issue. Roughly the same percentage of minorities in the relevant statistical pool should also be observed in the group of persons selected for the position at issue. Where a gross statistical disparity exists between the expected percentage of minorities selected and the actual percentage of minorities selected, then prima facie proof exists to demonstrate

> intentional discrimination in the selection of minorities to those particular positions.

Id. However, if the alleged discrimination is too remote in time, it may not create a compelling interest. *See Brunet v. City of Columbus*, 1 F.3d 390, 409 (6th Cir. 1993).

In this case, the City must meet the burden of producing a compelling interest sufficient to warrant the imposition of the race-conscious remedy contained in the Amended Consent Decree in selecting patrol officers from the May 18, 1992 eligibility list. The City first attempts to satisfy this burden by referring to the language of the original Consent Decree, which states that the race-conscious relief was supported by the "extended history of hearings, findings and orders" in the *Shield* case. (Doc. # 83 at 4) The City states that the following is represented in the Consent Decree: in the December 21, 1972 Order, Judge Thomas found race discrimination in the 1972 entrance examination; in the July 6, 1974 Orders, Judge Thomas found race discrimination in the recruitment, post-examination screening, and 1973 promotional criteria; in the September 27, 1976 Order, Judge Thomas found intentional discrimination in the administration of assignments and transfers; and in the September 29, 1976 Order, Judge Thomas found intentional race discrimination in making certain promotions in 1975. (Doc. # 79, Ex. B ¶¶ 2-3) In directing this Court to this information, the City contends that these "separate, express judicial findings of racial discrimination in connection with personnel decisions in the [CPD]" demonstrate that the Consent Decree and the Amended Consent Decree were supported by a compelling governmental interest. (Doc. # 89 at 1)

Next, the City directs this Court to a previous ruling made by Judge Thomas in the instant case. More specifically, the City points to Judge Thomas' resolution of

Plaintiffs' Motion for Temporary Restraining Order and for a Preliminary Injunction. The City explains that, in deciding whether such relief was warranted under the facts and circumstances of this case, Judge Thomas considered whether Plaintiffs had established that the minority hiring preferences in the Amended Consent Decree deprived them of any basic constitutional rights. The City states that, to this end:

> Judge Thomas specifically analyzed and distinguished *Croson*, *supra*, and *United Black Firefighters*, *supra*, finding that '[t]his Court in its consent decrees and in the several adjudications that preceded the 1977 consent decree made numerous findings of past discrimination.' Accordingly, unlike *Croson* and *United Black Firefighters*, in which the Supreme Court and the Sixth Circuit held that there was insufficient evidence of past discrimination to support a compelling interest, Judge Thomas unambiguously concluded that this Court's 'past discrimination predicate' was 'a constitutional basis for the hiring preference that [he] imposed in the 1977 order and again in the amended December 21, 1984 order.'

(Doc. # 79 at 14) Accordingly, the City argues that because "Judge Thomas unambiguously analyzed the constitutionality of the consent decree pursuant to the Supreme Court's pronouncements in *Croson*," this Court may not depart, in accordance with the "law of the case doctrine," from the determination that the evidence in the record established a compelling interest for imposing the race-conscious remedy. *Id.* at 15-16.

To the contrary, Plaintiffs contend that the race-conscious remedy at issue was not supported by a compelling interest because there exists no evidence to

demonstrate a finding of intentional race discrimination by the CPD. (Doc. # 77 at 13) That is, Plaintiffs claim that "[t]he record in this case is devoid of anything but a remote history of discrimination in the hiring of police officers by the City of Cleveland." *Id.* at 14. Plaintiffs state that the findings made by Judge Thomas in the December 21, 1972 Order concerning the entrance examination, as well as the resultant Consent Decree, were based upon the fact that the entrance examination, at that time, was not shown to be job-related. *Id.* Thus, Plaintiffs claim that the corresponding Order by Judge Thomas calling for the institution of a new examination arose due to the need for the examination to be demonstrably job-related, not in response to findings of race discrimination. *Id.* Plaintiffs state that:

> the City admits that all patrol officer examinations from 1974 through the 1992 tests were validated for job relatedness. Thus, even if the City could present statistical evidence based on a proper comparison of the relevant job market that would support a prima facie finding of discriminatory impact, that the tests have been properly validated and would be found to be job related defeats any attempt by the City to argue that there exists sufficient evidence of discrimination to justify a race-based remedy.

Id. at 15. Furthermore, Plaintiffs claim that Judge Thomas, again, found no evidence of race discrimination in 1984 when he revisited the issue in the context of approving the Amended Consent Decree. *Id.* Plaintiffs also state that Judge Thomas recognized that the City exercised good faith in carrying out the Consent Decree. *Id.*

In the alternative, Plaintiffs argue that even if there were evidence to demonstrate race discrimination in the CPD's hiring process sufficient to support a compelling interest through a temporary race-conscious remedy, such

evidence may not be used to justify the remedy in 1992 and beyond. *Id.* at 16. Plaintiffs assert that such evidence of past discrimination is "too remote to support a compelling interest." *Id.* (citing *Brunet*, 1 F.3d at 404). On this basis, Plaintiffs contend that they are entitled to summary judgment.

In this case, the Court finds that the City satisfies its burden of demonstrating that it had a compelling interest in implementing the race-conscious remedy at issue. The Court reaches this decision based upon a thorough review of the extensive record, spanning nearly three decades in time, during which significant changes in the relevant law took place. In resolving the issue of whether a compelling interest existed with respect to the hiring objective giving rise to the selection from the 1992 eligibility list, this Court begins its inquiry with the commencement of the *Shield* case. This Court finds that it is only with an in-depth understanding of the state of events in the *Shield* case that the Court may reach a decision here that serves the interests of justice, fairness, and the law. In following the *Shield* case as it developed over time, this Court does not look singularly at particular findings made in the context of that litigation. Rather, this Court looks to the record as a whole in the context of the significant changes in the existing law in resolving the issue of whether a compelling interest existed for the race-conscious remedy.

As an initial matter, this Court first observes that Judge Thomas began presiding over the *Shield* case more than fifteen years prior to the Supreme Court's landmark decision in *Croson*, delineating that the Fourteenth Amendment requires strict scrutiny to apply to all race-based actions implemented by governments on the state and local level. The *Shield* case began at the time of the *Griggs* decision, in which the Supreme Court, for the first time, adopted the disparate impact concept of race discrimination.

In addition, the Supreme Court's approach to affirmative action developed and made significant changes during the life of the *Shield* case. The state of the law went from finding the use of quotas illegal in a higher education setting in *Bakke*, to sanctioning quotas used by a private employer in *Weber*. The Supreme Court then expanded the scope of affirmative action in the 1980s, with its decisions in *Fullilove*, *Sheet Metal Workers*, and *Local 93*, yet ultimately tightened the reins on affirmative action in *Wygant*. After a decision advantageous to affirmative action supporters in *Paradise*, the Supreme Court made its landmark decision in *Croson*. Then seemingly changing the course again, the Supreme Court allowed the pendulum to swing back the other way in *Metro Broadcasting*. Finally, in changing the course once more, the Supreme Court announced in *Adarand* what today remains the law of the land: that strict scrutiny applies to all race-conscious plans at the local, state, and federal level.

Significantly, therefore, Judge Thomas did not have the benefit of knowing that, under the current state of the law, strict scrutiny mandates the demonstration of a firm evidentiary basis for a finding of past discrimination that warrants the use of a race-based remedy. Thus, at the time that the *Shield* case began, Judge Thomas and the parties to that litigation were unaware that, as the law developed over time, the party defending the remedial action would ultimately bear the burden of demonstrating that a compelling interest existed for the race-conscious remedy.[25]

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[25] In light of the development of the *Shield* case, however, the Court notes that putting the burden on Defendants here to set forth a strong basis in evidence for the remedial action inevitably places them in a precarious position. That is, the issue arose after *Croson* and *Adarand* of whether the City, who contested the Consent Decree in the first instance, bore the burden of returning to this Court to seek modification or termination of the Amended Consent Decree, in light of the

In the *Shield* case, the City vigorously defended itself in the face of the allegations of race discrimination within the CPD from 1972 until 1977. By 1977, Judge Thomas had rendered at least five decisions concerning the CPD's personnel practices in favor of the Shield Club and against the City. For example, Judge Thomas issued the Order on December 21, 1972, finding discrimination in the 1972 entrance examination.

In reviewing the merits of the *Shield* Plaintiffs' allegations of race discrimination in the December 21, 1972 Order, Judge Thomas found that "the evidence created a prima facie case that the battery of tests constituting the examination of July 15, 1972, had a racially discriminatory impact upon the [B]lacks and Hispanics who took the examination." *Shield*, 370 F. Supp. at 253. In that Order, Judge Thomas specifically recognized that although Blacks and Hispanics only constituted 23% of the those taking the

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development of the relevant law. Here, the City was not required under the Amended Consent Decree to abide by a hiring remedy that was to extend for an indefinite period of time similar to that determined to be unconstitutional by the Sixth Circuit in *Detroit Police Officers Assoc. v. Young*, 989 F.2d 225, 227 (6th Cir. 1993) (finding that the affirmative action plan no longer served the same compelling state interest under changed circumstances over two decades). Rather, the Amended Consent Decree approved by Judge Thomas called for a race-conscious remedy that was limited in duration. As such, Defendants did not return to this Court seeking modification or termination of the remedy. The instant Plaintiff class, however, consisting of those individuals purportedly injured by the application of the Amended Consent Decree to the 1992 eligibility list, brought the matter in this Court, leading to the cross-motions pending before it today. In doing so, Plaintiffs place Defendants in the precarious position of defending its implementation of a hiring scheme that it fought to prevent in the first instance.

entrance examination, they represented 64% of those who failed the examination. *Id.* Similarly, Judge Thomas found that the Blacks and Hispanics who took the examination had a failure rate of 26.3%, as compared to the Caucasian failure rate of only 4.5%. *Id.* Based upon this evidence, Judge Thomas concluded that there existed a prima facie showing of a racially discriminatory impact, which shifted the burden to Defendants to demonstrate a manifest relationship between the examination and the patrol officer position. *Id.* Judge Thomas found that Defendants did not overcome the prima facie showing, because they failed to demonstrate that the examination in question was, in fact, job-related. Therefore, Judge Thomas held that the *Shield* Plaintiffs were entitled to injunctive or mandatory relief. *Id.* at 254. In so holding, Judge Thomas stated that, regardless of the government's alleged good intentions, a prima facie showing of race discrimination arose in the presence of the statistical disparity. *Id.* at 253.

Some time later, in a July 6, 1974 Order, Judge Thomas made additional findings of race discrimination within the CPD. This time, the discrimination arose in the context of the CPD's recruitment practices and post-examination screening practices. In that Order, Judge Thomas addressed, among other issues, the CPD's screening of minorities who passed the entrance examination for the patrol officer position. Although the entrance examination had, at this point in time, been validated as job-related in compliance with Judge Thomas' 1972 Order, Judge Thomas found that the evidence established a remaining statistical disparity in the percentage of minorities employed by the CPD, as compared to the percentage of minorities residing in the City of Cleveland and in Cuyahoga County. *Shield Club v. City of Cleveland*, No. C72-1088 at *1 (N.D. Ohio filed July 6, 1974).[26] Consequently, Judge Thomas concluded that

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[26] In the Order, Judge Thomas noted the following figures in

portions of the screening procedure administered by the CPD for the selection of patrol officers from the eligibility list directly contributed to a higher portion of non-minorities than minorities being selected for the position. *Id.* As such, Judge Thomas determined that the CPD should devise and

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evidence:

Year	% of Blacks Employed in CPD	% of Blacks Residing in Cleveland	% of Blacks Residing in Cuyahoga County
1950	4.4%	16.2%	10.88%
1960	6.2%	28.6%	15.49%
1970	7.9%	38.3%	19.07%

Shield Club, No. C72-1088 at *2. Judge Thomas also referred to the following statistical evidence:

> As of January 1, 1962, there was a total of 1,897 policemen and policewomen in the Cleveland Police Department. Of that number, minority employment totaled 109 or 5.75%. As of October 1, 1973, the CPD employed 2,437 policemen and policewomen. Of that total, 216 or 8.85% were minorities. This total included the 194 new recruits appointed subsequent to the December 21, 1972 order of this court, which required that 18% of those appointed be either [B]lack or Hispanic. The result of this order was to raise the number of minority members on the police force from 180, or 7.87% of the total 2,289 policemen and policewomen on January 1, 1973, to the already mentioned figures of October 1, 1973, or an increase in percentage of 1%.
>
> The Spanish speaking population of the City of Cleveland amounted to 13,972 in 1970 or 1.86% of the total population. By 1974 there were four Hispanic members of the CPD, three of whom were added as a result of the December 21, 1972 order. The four Hispanic officers constitute .16% of the current membership of the police force.

Id. Based in part on this statistical information, Judge Thomas found race discrimination in the CPD's screening procedures.

implement new screening procedures that were racially neutral in nature. *Id.*

These findings made in the 1972 and 1974 Orders, in addition to other findings of discrimination in the CPD's personnel practices, including another July 6, 1974 Order finding discrimination in the 1973 promotional criteria, the September 27, 1976 Order finding intentional discrimination in the administration of assignments and transfers, and the September 29, 1976 Order finding intentional discrimination in the making of certain sergeant promotions in 1975, gave rise to the Consent Decree reached by the parties in 1977. Paragraph 12 of that Decree outlined the temporary measures to be implemented in order to "partially remedy the present effects of past-discrimination in the selection of police officers" and to "foster the employment of qualified minority police officers by the defendants." *Id.* ¶ 12. That portion of the Consent Decree stated, in pertinent part:

a) The defendants shall establish an appropriate minority hiring goal for the Cleveland Police Department, said goal to be expressed in percentage form (the percentage of all police officers employed by the City of Cleveland who are minority) and be no less than the goal of 35.8% adopted by the City's 1977 "Affirmative Action Plan" and based upon the external labor market figures contained in the 1970 census.

b) The defendants shall establish appropriate timetables for the attaining of the aforementioned goal.

c) Temporarily and until such time as at least 90-95% of the percentage goal established under paragraph 12(a) supra is attained, the defendants shall hire no less than three minority police officers for every four non-

> minority police
> officers. . . .

Id. The Consent Decree further provided that, in complying with these requirements, the CPD must use selection criteria that is non-discriminatory and demonstrably job-related. *Id.* ¶ 9.

On November 11, 1977, Judge Thomas held an approval hearing with respect to this Consent Decree. In deciding whether to adopt the remedy contained therein, Judge Thomas reflected on the five-year long record in the case and delivered the following statement to the parties:

> I note that when the question arose of whether the plaintiff had proved its claim of a historic pattern of racial discrimination, this Court ruled on July 6, 1974, as follows. After examining the evidence, I concluded on page 6 of that order:
>
> "Despite this evidence and certain additional instances testified to by others, the entire record does not convince this Court that the plaintiffs have established a historic pattern of racial discrimination in the Cleveland Police Department."
>
> However, that finding is not engraved in stone. I note that the very party involved, The City of Cleveland and the Cleveland Police Department, has stipulated in this order a contrary fact. In Paragraph 3 of the preliminary matters appears this statement:
>
> "As reflected by the entire record in C-72-1088 and C-77-346, there has been a history of race discrimination in the hiring practices and in the promotion practices of the City of Cleveland's police department."
>
> I do not feel that the suggestion that there must be a hearing to go through what evidence was spread on this record for five years is required when the very party

> involved – and the FOP is not the party that is any position to make this admission; the only party that is in a position to make the admission is the City of Cleveland – comes to this court and makes this admission.

Hearing Trans. at 48-51. Relying on the case of *Flinn v. FMC Corporation*, 528 F.2d 1169 (4th Cir. 1975), Judge Thomas next recognized that a trial court is not required to conduct a hearing on the merits when it considers a proposed Consent Decree. Judge Thomas then read from page 1173 of the *Flinn* decision, which states:

> While it should extend to any objector to the settlement 'leave to be heard, to examine witness and to submit evidence' on the fairness of the settlement, it is entirely in order for the trial court to limit its proceedings to whatever is necessary to aid it in reaching an informed, just and reasoned decision. So long as the record before it is adequate in reaching 'an intelligent and objective opinion of the possibilities of ultimate success should the claim be litigated' and 'from an educated estimate of the complexity, expense and likely duration of such litigation, * * * and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise, [it is sufficient].

Accordingly, Judge Thomas stated that "certainly here [he was] prepared to accept this admission and stipulation on the part of the City of Cleveland without a trial." Therefore, after making additional findings and concluding that the Consent Decree was the product of "many, many months of negotiation, discussion, and actually changes of positions of both the plaintiff and the city with reference to the matters at issue between them," Judge Thomas signed and adopted the

Consent Decree. *Id.* at 50-51.[27]

In 1984, Judge Thomas then had the opportunity to re-evaluate the contents of the Consent Decree, in light of the Motion to Modify and Extend the Consent Decree filed by the *Shield* Plaintiffs. (Doc. # 79, Ex. D)[28] In reviewing the Motion, Judge Thomas found that an issue of fact remained as to whether the Consent Decree should be modified and extended with respect to the CPD's hiring procedures. *Id.* at Ex. J at 2-4. As such, Judge Thomas held six days of hearings on the issue in November and December of 1984. *Id.* at 4.

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27 This Court finds it important to note that Judge Thomas was not presented with a situation like that in *Aiken*, 37 F.3d at 1158, where the City expressly denied in the consent decree that it had unlawfully discriminated. Rather, Judge Thomas was presented with the opposite situation, in which Defendants expressly admitted to engaging in discriminatory practices in the Amended Consent Decree.

28 Plaintiffs argued that a modification and extension of the Consent Decree was warranted under the circumstances because:

> Active judicial involvement in the subject matter of the consent decree [would] cease on December 31, 1984. . . . Thus [the extension was necessary] in view of the fact that the defendant has not substantially satisfied the affirmative goals, set forth in the consent decree, albeit modest compliance with the decree [was] evident. Plaintiffs accordingly [moved] the Court to modify the decree toward enhancing the probability of accelerated compliance; clarify the decree relevant to a better understanding of the litigants [sic] respective obligations; and to extend [the] Court's active jurisdiction over the subject matter of the decree toward continued compliance.

(Doc. # 79, Ex. D at 1-2)

Upon completion of the six-day evidentiary hearing on this issue, prior to a decision by Judge Thomas, the parties submitted the Amended Consent Decree to him for consideration. *Id.*, Ex. K. The Amended Consent Decree eliminated the portion of the Consent Decree relating to the promotions, evidencing the recognition that the goal in the original Consent Decree, at least with respect to promotions, had been satisfied. The Amended Consent Decree specifically contained provisions concerning the CPD's hiring procedures, demonstrating the parties' agreement that the hiring goal furthered by the agreed upon remedy in 1977 had not been satisfied. Accordingly, it is axiomatic that, in light of the evidence presented during the six-day hearing, Defendants, who initially vigorously opposed the modification and extension of the Consent Decree, agreed to the Amended Consent Decree based upon the anticipation that Judge Thomas may have, once again, ruled against them, finding that discrimination existed in the CPD's hiring procedures. Thus, the Amended Consent Decree halted Judge Thomas' ultimate conclusion on the merits of this issue.

The Amended Consent Decree evidenced an agreement between the parties that: (1) the race-conscious remedy contained therein would be in effect until such time as 33% of the officers in the CPD were minorities, or for eight years, whichever occurred first; and (2) in the event that the City failed to hire 70 patrol officers in any of the eight years, the remedy would continue for one additional year for each year that the City failed to meet this hiring requirement, until minority representation in the CPD was at the 33% level. Judge Thomas signed and thus adopted the Amended Consent Decree in December of 1984.

Approximately ten years thereafter, Plaintiffs presented Judge Thomas with a challenge to those provisions in the instant case. In addition to filing a Complaint,

Plaintiffs here sought a temporary restraining order and a preliminary injunction with respect to the CPD's hiring procedures arising under the Amended Consent Decree. Once again, Judge Thomas held a hearing on the hiring issue on May 18, 1994.

During the course of the hearing, Judge Thomas made quite clear that there were not only findings of race discrimination in the record, but there were, in fact, adjudications of race discrimination in the record. The following exchange occurred between Edward Kramer, counsel for Plaintiffs, and Judge Thomas:

Mr. Kramer:	When the Court entered into the amended consent decree in 1984, it certainly had no guidance from the U.S. Supreme Court, which guidance is given in its decision five years later in the City of Richmond versus J.A. Croson Company, 488 U.S. 469.
Judge Thomas:	How does that apply?
Mr. Kramer:	That case –
Judge Thomas:	I thought in that case there was no finding of discrimination, and that was the basis of Justice O'Connors' ruling.
Mr. Kramer:	That's correct, your Honor.
Judge Thomas:	Is that true in this case?
Mr. Kramer:	No, your Honor. Of course, there has been a finding by this Court.

Judge Thomas: Adjudication. More than just a finding.

Mr. Kramer: Adjudication, that's correct. . . .

(Doc. # 79, Ex. N at 10-11) At the close of that hearing, Judge Thomas rendered a decision. He stated, in pertinent part:

> The . . . question is whether the Plaintiff has been able to show that the amended consent decree minority hiring preference deprives the Plaintiffs of any basic constitutional rights under the equal protection clause of the 14th Amendment or any other relevant constitutional right.
>
> The Plaintiffs rely on Richmond v. J.A. Croson Company, 488 U.S. 469, a 1989 case. The City of Richmond, Virginia, pursuant to an adopted plan – I assume by ordinance – required prime contractors who were awarded city construction contracts to subcontract at least 30 percent of the dollar amount of each contract to one or more minority business enterprises.
>
> The Supreme Court struck down the ordinance. In short, it held, "The City failed to demonstrate a compelling governmental interest justifying the Plan, since the factual predicate supporting the Plan does not establish the type of identified past discrimination in the city's construction industry that would authorize race-based relief under the 14th Amendment's Equal Protection Clause."
>
> Similarly in United Black Firefighters Association versus the City of Akron, the Sixth Circuit held in pertinent part, "The consent decree embodied racial preference. Racial preference had to comport with strict scrutiny standards and the district

> court improperly entered a consent decree in the absence of past discrimination."
>
> In contrast to Croson and in contrast to United Black Firefighters, this Court in its consent decrees and in the several adjudications that preceded the 1977 consent decree made numerous findings of past discrimination. I need only [refer to] the preamble of the consent decree. . . .
>
> Rather than Croson and United Black Firefighters, both Vanguards 1, decided by the United States Supreme Court, and Vanguards 2, within two weeks decided by the Sixth Circuit, support this Court's past discrimination predicate as a constitutional basis for the hiring preference that I imposed in the 1977 order and again in the amended December 21, 1984 order.
>
> This case has been well represented and well argued, both for the Plaintiffs and for the City. However, I must make a decision, and I determine that the Plaintiffs have not carried their burden of proof as to the temporary restraining order requirements. The motion for the temporary restraining order is, therefore, respectfully denied.

Id., Ex. N at 116-19 (internal citations omitted). Thus, Judge Thomas held that, in addition to other findings in the record, the findings set forth in the original Consent Decree constituted the compelling interest furthered by the use of the race-conscious remedy contained in the Amended Consent Decree.

In addition, Judge Thomas clearly made this determination upon reviewing the United States Supreme Court's decisions in *City of Richmond v. J.A. Croson Company* and *Local No. 93 v. City of Cleveland*, and the Sixth Circuit Court of Appeals' decisions in *United Black Firefighters Association v. Akron* and *Vanguards of*

Cleveland v. City of Cleveland. Judge Thomas' express conclusion that "this Court in its consent decrees and in the several adjudications that preceded the 1977 consent decree made numerous findings of past discrimination," is evidence sufficient to demonstrate that a compelling interest existed with respect to the race-conscious remedy. Judge Thomas found that, after presiding over numerous years of litigation concerning this issue, in the *Shield* case as well as in the instant case, that the record did, in fact, contain evidence that was not too remote in time to support a race-conscious remedy designed to eradicate the remaining vestiges of racial discrimination in the CPD's hiring practices.[29]

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29 This Court notes that it reaches the conclusion that a compelling interest existed independent of Defendants' suggested use of the "law of the case" doctrine. In this case, Defendants urge this Court to find that Judge Thomas' denial of Plaintiffs' motion for a temporary restraining order and a preliminary injunction is dispositive of the instant summary judgment motions because it constitutes the law of this case. However, in *Wilcox v. United States*, 888 F.2d 1111 (6th Cir. 1989), the Sixth Circuit clearly held that "[b]ecause of the lesser burden of proof required to support a motion for a preliminary injunction as contrasted with a motion for summary judgment, a trial court's disposition of the substantive issues joined on a motion for extraordinary relief is not dispositive of those substantive issues on the merits." *Id.* at 1114. The *Wilcox* Court reached this conclusion based upon the fact that a court's denial of a plaintiff's motion for a temporary restraining order and for a preliminary injunction only demonstrates that the plaintiff is unlikely to succeed on the merits. *Id.* Here, the Court bases its decision that a compelling interest existed for the race-conscious remedy on a thorough review of the record, commencing with the *Shield* case in 1972 through the instant motions before the Court. In so doing, the Court examined Judge Thomas' rulings in the context of the *Shield* case as well as in this case, with due consideration given to Judge Thomas' extensive knowledge developed over the numerous years during which he presided over these cases concerning this issue.

Here, the record, in its entirety, reflects repeated rulings by Judge Thomas made over the course of many years finding race discrimination in the CPD's personnel procedures. Based upon these rulings, the Consent Decree and the Amended Consent Decree were established by the relevant parties and enforced by the Court. Thus, the parties effectively foreclosed an ultimate ruling on the merits upon reaching a settlement in the form of the Consent Decree and the Amended Consent Decree.

As such, this Court finds Plaintiffs' argument that Judge Thomas failed to make the required findings to constitute a compelling interest to be disingenuous. The Court concludes that, based upon the totality of the record before it, the City has carried its burden of establishing a compelling interest sufficient to satisfy the first step of the strict scrutiny analysis.

2. Narrowly Tailored

In finding that Defendants' hiring ratio as outlined in the Amended Consent Decree was justified by a compelling government interest, the Court now turns to the second step in the strict scrutiny analysis: whether the Amended Consent Decree was narrowly tailored to the achievement of the goal outlined therein. Plaintiffs advance several arguments in that regard.

Plaintiffs' Argument

Plaintiffs contend that the Amended Consent Decree has no foundation for the 33% minority hiring goal. More specifically, Plaintiffs state that the Amended Consent Decree "simply incorporates without question the 33% goal derived from the 1970 census." (Doc. # 77 at 21) Thus, Plaintiffs argue that "fourteen years of population change are simply ignored." *Id.* Plaintiffs allege that, in "allud[ing] to"

labor market figures from the 1970 census, the original Consent Decree inadequately defines the relevant labor market. Further, as Plaintiffs contend, the labor market originally relied upon is over-broad, as it fails to take into account various requirements such as age and education. *Id.* at 20.

Plaintiffs also state that the race-conscious relief was not necessary in light of the fact that the City of Cleveland used validated tests for 18 years prior to the 1992 examination. Moreover, as Plaintiffs contend, the City hired "substantially more than the minimum number of minorities between 1985 and 1992 than required by the terms of the 1984 Amended Consent Decree." *Id.* at 24-25. In support of their position, Plaintiffs propose that, while the City had not achieved its goal of hiring a minimum of 70 police officers in 1986 and 1991, as required by the Amended Consent Decree, the CPD hired an average of 84.62 officers each year from 1985 through 1992. Thus, Plaintiffs allege that the Amended Consent Decree could not have been narrowly tailored. Plaintiffs arrive at this figure by adding the total number of minorities hired as patrol officers between 1985 and 1992, which equals 302 patrol officers, to the total number of non-minorities hired as patrol officers during the same time frame, which is 375, providing for a grand total of 677 new patrol officers. In dividing 677 new patrol officer hires by 8 (the number of years between 1985 and 1992, inclusive), Plaintiffs deduce that, on an average, the CPD hired 84.62 patrol officers each year, which number exceeds the required minimum of 70 officers as set forth in the Amended Consent Decree.

In addition, Plaintiffs contend that the duration of the Amended Consent Decree was too long. Plaintiffs allege that the race preferences in the instant case actually began over twenty-two years ago, when, in 1972, Judge Thomas ordered 18% of all new hires to be minorities. As such,

Plaintiffs state that because the minority hiring goal was met prior to 1992, the affirmative action plan outlived its usefulness. *Id.* at 27-28.

Plaintiffs further allege that the Amended Consent Decree was not flexible because it did not provide any "meaningful waiver provisions" in the event that the "pool of qualified 'minority' applicants [was] low for any given year." *Id.* at 30-31 (citing *Middleton*, 92 F.3d at 411). In addition, Plaintiffs claim that in requiring a minimum of 70 new hires within the CPD, the Amended Consent Decree: (1) ignores the actual number of minorities hired; (2) ignores the City's operational needs; and (3) "fails to take into account that other years may be well above the 70-person hiring requirement." *Id.* at 31. Thus, as Plaintiffs contend, this goal established by the Amended Consent Decree lacked any relationship to "legitimate hiring goals." *Id.*

Finally, Plaintiffs claim that the race-based hiring goal in effect as a result of the Amended Consent Decree denied them their dream of becoming a police officer. Plaintiffs state that "due to the unwarranted extension of the 1984 Amended Consent Decree for an additional two years, many of the named plaintiffs and class members were not even considered for the position of Police Patrol Officer." *Id.* at 29. Thus, Plaintiffs contend that the race-based relief has undoubtedly had a hugely adverse effect on over 700 named class members.

Defendants' Argument

Defendants, on the other hand, contend that the Amended Consent Decree's 33% hiring goal is well supported in the record. In support of this position, Defendants direct the Court's attention to the fact that Judge Thomas conducted six days of evidentiary hearings prior to adopting the Amended Consent Decree. As a result of the

hearing, as Defendants allege, the Amended Consent Decree lowered the minority hiring goal from 35.8% to 33%, which suggests an acknowledgment of a change in the relevant labor market.

In addition, Defendants examine the qualified labor pool and applicant flow data, which purportedly demonstrate that the relief dictated by the Amended Consent Decree was narrowly tailored. Moreover, in looking to the Qualified Labor Pool Comparison Chart (identified previously in this Order), Defendants state that, even if the Court were to consider Plaintiffs' unsubstantiated definition of "qualified labor pool" (those applicants who passed the examination), the hiring goal was narrowly tailored to the relevant labor market. For example, as Defendants note, in 1992, Plaintiffs' qualified labor pool of 30.6% (Defendants' qualified labor pool of 41.5%) demonstrates that minorities represented only 29.6% of the CPD; however, in 1994, Plaintiffs' qualified labor pool of 33.7% (Defendants was 41%) showed minority representation of 33.7% as well. (Doc. # 83 at 12) As such, Defendants contend that the hiring goal and the ultimate workforce composition goal were well tailored to the results of the final two entrance examinations in 1992 and 1994. *Id.* at 13.

Defendants further state that Plaintiffs' argument concerning the actual number of minorities and non-minorities hired between 1985 and 1992 must be rejected, as Plaintiffs' position inappropriately calls for this Court's interpretation of the Amended Consent Decree, rather than the Court's consideration of the Amended Consent Decree's constitutionality. Defendants reiterate the terms of the Amended Consent Decree and contend that it requires a "year-by-year application" of its hiring goal (of a minimum of 70 new hires) rather than an overall application of that goal. *Id.* at 15. While Defendants concede that the hiring goal was in place for numerous years, as Plaintiffs allege,

they defend the hiring goal, claiming it was necessary to achieve the relevant minority population, even according to Plaintiffs' data. *Id.* at 16. Defendants state that although the race-conscious remedy began several years before the creation of the Amended Consent Decree, at the time of the extension and modification, in 1984, "the statistical evidence unquestionably revealed that the effects of the City's past discrimination remained unremedied." *Id.* Thus, Defendants contend that the statistical data demonstrating the disparity of minorities within the CPD is evidence that the Amended Consent Decree was narrowly tailored.

Defendants also dismiss Plaintiffs' argument that the Amended Consent Decree was not flexible because it lacked a "meaningful waiver provision." Defendants propose that the Amended Consent Decree had an appropriate waiver provision in that: (1) the Amended Consent Decree provided for the hiring of only qualified minorities; (2) the Amended Consent Decree permitted the maintenance of separate lists for minorities and non-minorities otherwise qualified; and (3) the Amended Consent Decree stated that "should the defendants exhaust the pool of qualified minority candidates from any given list, the defendants shall administer new entrance examinations and shall prepare new eligible lists." *Id.* at 18 (citations omitted). Thus, as Defendants allege, the Amended Consent Decree was flexible.

Finally, Defendants, in citing *Wygant, et al. v. Jackson Board of Education, et al.*, 476 U.S. 267, 283 (1986), state that Plaintiffs in the instant case must bear the burden of the remedial goal when society in general is benefitted. Defendants also contend that "[d]enial of a future employment opportunity is not as intrusive as loss of an existing job." *Id.*

The Court's Determination

In considering whether a race-conscious remedy, such as the hiring goals at issue herein, is narrowly tailored to serve a compelling governmental interest, courts must examine the following factors: (1) the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief, including the availability of waiver provisions; (3) the relationship of the numerical goal to the relevant labor market; and (4) the impact of the relief on the rights of third parties. *Aiken*, 37 F.3d at 1163 (citing *Paradise*, 480 U.S. at 17). These factors operate merely as a guide for the court's decision with regards to whether the remedy was narrowly tailored. *See Ashton*, 49 F. Supp.2d at 1056. As outlined below, in considering such factors, this Court finds that the Amended Consent Decree was narrowly tailored to serve a compelling governmental interest in view of the facts and circumstances of the instant case.

1. The Necessity for the Relief and the Efficacy of Alternative Remedies

Initially, in order to evaluate the necessity of race-based relief, such as the minority hiring goal outlined in the Amended Consent Decree, the Court must examine the purpose that the Amended Consent Decree was intended to serve. *Paradise*, 480 U.S. at 171. Because the purpose of the Amended Consent Decree is, in essence, an extension of the purpose of the original Consent Decree created in 1977, this Court will look to the stated purposes of both consent decrees, collectively, in analyzing the necessity of such relief. Undoubtedly, the purpose of the consent decrees at issue herein was to eradicate the present effects of past discrimination against minorities within the CPD, specifically pertaining to the hiring of such minorities. This goal, or purpose, was intended to be accomplished by increasing the number of minorities hired by the CPD as

patrol officers and, therefore, increasing the CPD's overall minority representation.

The original Consent Decree of 1977 states as follows:

> The purpose of the within consent decree is to resolve all outstanding matters pending in [the *Shield* litigation] by way of a final order and to effectuate an effective prospective remedy designed to eliminate all vestiges of race discrimination within the City of Cleveland Police Department.

(Doc. # 77, Ex. A ¶ 1) The Consent Decree further states that certain temporary procedures outlined therein were necessary in order to "partially remedy the present effects of past discrimination in the selection [and promotion] of police officers and in order to foster the employment of qualified minority police officers." *Id.* ¶¶ 12, 17. By virtue of its extension and modification in 1984, the Amended Consent Decree adopted the same purpose of the original Consent Decree.[30] *Id.*, Ex. B ¶ 4.

Having evoked the goal of the Amended Consent Decree at issue herein, this Court must now discern whether the use of the Amended Consent Decree would enable Defendants to reach that goal. In other words, the Court must determine the following: (1) whether the Amended

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30 As stated previously in this Memorandum Opinion and Order, the purpose of the Amended Consent Decree was the same as the original Consent Decree, with the exception that the Amended Consent Decree did not address the promotions of police patrol officers. The focus on hiring, to the exclusion of promotions, took place when Judge Thomas determined that, as a result of the original Consent Decree, the discrimination found in the promotions of minority officers had been eradicated by 1984.

Consent Decree is "directed at accomplishing a specific goal, and is not under- or over-inclusive, meaning it does not remedy less than the identified discrimination or affect racial or gender groups for which no discrimination has been identified;" and (2) whether the goal could have effectively been reached through means other than a race-based remedy and/or whether the goal had been reached prior to the use of the affirmative action at issue. *Ashton*, 49 F. Supp.2d at 1060. In *Croson,* the Supreme Court determined that an affirmative action plan must respond to identified discrimination. 488 U.S. at 507. Societal discrimination, or statistical disparity, alone is insufficient to serve as a basis for "rigid racial preferences." *Id.* at 506.

In this case, Plaintiffs essentially argue that the Amended Consent Decree was not necessary for two reasons. First, Plaintiffs assert that the Amended Consent Decree was unnecessary because the entrance examinations from February 23, 1974 through 1992 had been validated for job-relatedness. Next, Plaintiffs state that the Amended Consent Decree was unnecessary because the City hired "substantially more than the number of minorities between 1985 and 1992 than required by the terms of the Amended Consent Decree." The Court addresses Plaintiffs' arguments in turn.

a. The Significance of Job-Related Entrance Examinations

In support of their first position, Plaintiffs cite to *Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994), and *Ashton v. City of Memphis*, 49 F. Supp.2d 1051 (W.D. Tenn. 1999). These cases involved lawsuits brought by white members of the Memphis Police Department and the Memphis Fire Department, who sued the defendants for reverse discrimination in connection with promotions made pursuant to an affirmative action program. Although these cases were originally filed and handled by the district court

as separate lawsuits, *see Aiken, et al. v. City of Memphis* (Case No. 92-6154) and *Ashton, et al. v. City of Memphis*, (Case No. 92-6159), the Sixth Circuit consolidated these cases for purposes of appeal under the name of *Aiken*. *See Aiken*, 37 F.3d at 1160, n. 1. Thus, Plaintiffs refer to the action entitled *Aiken* on appeal to the Sixth Circuit, but refer to the case entitled *Ashton* on remand, which is effectively the same litigation, despite the difference in the case name. *Id.*

In *Aiken*, the plaintiffs appealed the district court's grant of summary judgment in favor of the defendants on the reverse discrimination claim. On appeal, the Sixth Circuit held that the district court was precluded from entering summary judgment because genuine issues of material fact remained concerning whether the promotions at issue were made pursuant to a narrowly tailored remedy. *Id.* Based upon this determination, the Sixth Circuit remanded the case to the district court, instructing it to reexamine its finding on the narrowly tailored issue. *Id.* at 1166. In particular, the Sixth Circuit instructed the district court to consider, *inter alia*, the defendants' failure to utilize or even develop validated procedures for promotions in the police and fire departments. *Id.* In so holding, the Sixth Circuit stated that the use of validated non-discriminatory promotional procedures "may be an acceptable alternative to race-based relief," and, thus, was highly relevant to the district court's analysis. *Id.* at 1155.

Upon remand in *Ashton*, the District Court for the Western District of Tennessee determined that the defendants' affirmative action plan, under which qualified white applicants for the sergeant position were passed over in favor of less qualified black applicants, was not narrowly tailored to accomplish the objective of eliminating discrimination in sergeant selection. *Ashton*, 49 F. Supp.2d at 1061. The district court stated that "had a validated test

been developed, the necessity of using affirmative action to adjust the order of promotions produced from the results of a non-valid test would be a moot issue; [the defendants] would simply make promotions, without racial discrimination, according to the rank order results of the validated test." *Id.* Thus, the district court held that the plaintiffs in that case successfully demonstrated that the defendants' use of affirmative action was unnecessary because they could have developed a validated promotional procedure to obviate the need for affirmative action. *Id.* at 1063.

Applying those rulings to the instant case, Plaintiffs argue that the use of validated entrance examinations for the patrol officer position from 1974 through 1992[31] rendered the race-based remedy at issue unnecessary. Although Plaintiffs are correct in stating that the City utilized validated entrance examinations from 1974 through 1992, the use of such validated examinations does not necessarily obviate the need for other remedies of past discrimination, such as that contained in the Amended Consent Decree at issue herein. In examining whether the goal in the instant case could have *effectively* been reached through means other than a race-based remedy, as required to do, *see Ashton*, 49 F. Supp.2d at 1060 (emphasis added), this Court concludes that, in light of the evidence in the record, the validation of the entrance examinations did not, alone, effectively remedy the past discrimination found by the Court. As Defendants state in their Motion, validated entrance examinations are not an end in themselves; rather, they are a means toward achieving a

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31 In his Order of December 21, 1972, Judge Thomas directed the *Shield* Defendants to employ a validation study and create an examination that was, in fact, job-related. *Shield Club*, 370 F. Supp. at 256. As a result of this Order, all entrance examinations for the position of police patrol officer, from February 1974 through 1992, were validated for job-relatedness. (Doc. # 77 at 23 (citing Defendants' Admissions Nos. 43 and 57)).

consent decree's objective of remedying the effects of past discrimination. *See Mackin v. City of Boston*, 969 F.2d 1273, 1277 (1st Cir. 1992).

As previously recognized in this Memorandum Opinion and Order, the Amended Consent Decree mandated that:

> [t]emporarily and until such time as 33% of the police officers employed by the City are minorities or until December 31, 1992 (eight years), whichever time or event occurs first, defendants shall hire no less than three minority police patrol officers for every four non-minority police patrol officers. . . .

(Doc. # 79, Ex. K ¶ 4(a)) Furthermore, in the event that Defendants failed to hire a minimum of 70 police patrol officers in any of the eight years, from January 1, 1985 to December 31, 1992, Defendants were required to continue the hiring ratio described above "for one additional year for each year in which the City shall fail to hire the minimum number of police patrol officers, unless the City has otherwise achieved the 33% level." *Id.* ¶ 4(b).

In referring to Table 1 in this Memorandum Opinion and Order, the record reflects that in 1992, upon the scheduled expiration of the Amended Consent Decree, the minority population reached only 29.6%, and thus fell short of the 33% goal. In addition, in referring to Table 2 in this Memorandum Opinion and Order concerning the hiring distribution, it is evident that in 1986, and again in 1991, the City failed to hire at least 70 police patrol officers. More specifically, in 1986, the City hired 48 officers; and in 1991, the City hired 64 officers. Therefore, by the terms of the Amended Consent Decree, the City failed to achieve its goal with respect to the CPD's hiring practices.

Regardless of the fact that the City used validated entrance examinations throughout the relevant time period, the goal of achieving 33% minority workforce in the CPD was not reached until July of 1994. Thus, the validated examinations, alone, were ineffective in achieving that goal. This is evident from the figures presented by Defendants and from the testimony of Lieutenant Seger of the CPD. Lieutenant Seger, who was responsible for monitoring the percentage of minorities within the police force, testified that as of May 18, 1994, the percentage of minorities on the police force was less than 33%, and it had never been at or above 33%.[32] In addition, despite the speed with which the City attempted to achieve this 33% goal – no less than three minority officers for every four non-minority officers (or 42.85%) – the goal remained unfulfilled until 1994, when the Court terminated the Amended Consent Decree.

Moreover, other courts have found hiring ratios similar to the hiring ratio in the instant case to be a valid means of realizing long-term goals of consent decrees. In *Paradise*, Justice Powell, in his concurring opinion, concluded that a one-for-one (or 50%) hiring requirement bore a reasonable relationship to the 25% minority labor pool relevant in that case. He stated that the 50% figure was "not itself the goal; rather it represent[ed] the speed at which the goal of 25% [would] be achieved. . . . The interim requirement of one-for-one promotion (had it continued) would simply have determined how quickly the Department progresse[d] toward this ultimate goal." 480 U.S. at 179-80.

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32 This Court is mindful of the fact that Judge Thomas, who presided over the *Shield* case for numerous years, and for a time, this case, and who was enormously familiar with every aspect of the two cases, found the hiring goal espoused in the Amended Consent Decree to be a necessary and reasonable goal, given the facts and circumstances of the case at the time. This is evident from the hearings he conducted, his findings, and his approval of the Amended Consent Decree and his signature thereon.

The Sixth Circuit, in *Aiken*, applied this reasoning in finding that a 20% promotion "floor" in a consent decree was "merely a means of speedily realizing the long-term goals of the decrees." 37 F.3d at 1164-65. Thus, the 20% promotion floor was a "permissible means of realizing those goals." *Id.*

In this case, as Defendants point out, the hiring ratio of 42.85% (3 minorities for every 4 non-minorities) was more closely related to the ultimate hiring goal of 33% minorities than that permitted in *Paradise*, wherein the Sixth Circuit upheld a 50% hiring ratio designed to achieve 25% minority representation. Thus, this Court finds that, in light of the above, the 33% hiring goal contained within the Amended Consent Decree was necessary, regardless of the use of validated entrance examinations. Moreover, it is doubtful that the 33% minority representation within the CPD would have been achieved by 1992, the scheduled expiration of the Amended Consent Decree, absent the use of the race-conscious remedy.

b. The Effect of the Actual Number of Minorities Hired

Plaintiffs' second argument, that the race-based relief offered in the Amended Consent Decree was unnecessary because the City hired "substantially more than the number of minorities between 1985 and 1992 than required by the terms of the Amended Consent Decree," also fails. Plaintiffs assert that between 1985 and 1992, the City hired an average of 84.62 police patrol officers; thus, the City exceeded the minimum of 70 officers as required by the Amended Consent Decree by at least 14 officers. Plaintiffs argue that because this number had been reached by 1992, the extension for two additional years, into 1994, was not necessary.

In arriving at the above figure, Plaintiffs add the total number of officers hired between 1985 and 1992, then divide the total by the number of years (eight). However, there is

no basis in the Amended Consent Decree, itself, for this calculation. The Amended Consent Decree specifically provides that:

> [i]n the event the defendants fail to hire a minimum number of 70 police patrol officers in *any of the eight calendar years* beginning January 1, 1985 and ending December 31, 1992, the hiring ratio described in Paragraph 4(a), above shall continue in full force and effect for *one additional year for each year in which the City shall fail to hire the minimum number of police patrol officers*, unless the City has otherwise achieved the 33% level set forth in Paragraph 4(a). . .
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(Doc. # 77, Ex. B. ¶ 4(b)) (emphasis added). As evident from the Amended Consent Decree, Defendants were required to extend the terms of the Amended Consent Decree "one additional year for *each* year" the City did not hire a minimum of 70 officers, "in *any* of the eight . . . years." *Id.* The terms of this Amended Consent Decree are clear and unambiguous, and they do not permit the averaging of the number of new hires. The record unequivocally demonstrates that in 1986 and 1991 the City failed to hire at least 70 police patrol officers. As such, pursuant to the terms of the Amended Consent Decree, the hiring ratio outlined in Paragraph 4(a) of the Amended Consent Decree was required to continue for two additional years, thus, into 1994.

Furthermore, the Court notes that, in making the above argument, Plaintiffs contest the interpretation of the Amended Consent Decree, rather than its constitutionality. However, the law in the Sixth Circuit does not permit third parties to a consent decree to enforce their understanding of the decree's terms. *Aiken*, 37 F.3d at 1167; *see also Vogel v. City of Cincinnati*, 959 F.2d 594, 598 (6th Cir. 1992). In *Aiken*, the white officers who sued for reverse discrimination attempted to argue, in addition to its unconstitutionality, that

the consent decrees at issue therein were not applied as written. 37 F.3d at 1167. The officers stated that they had standing to pursue such a claim because they were the intended third-party beneficiaries of the consent decrees. *Id.* The Sixth Circuit, however, in relying upon the Supreme Court's decision in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917 (1975), held that "the plain language of *Blue Chip* indicates that even intended beneficiaries of a consent decree lack standing to enforce its terms." *Id.* at 1168. Therefore, this Court finds that Plaintiffs lack standing to present any argument concerning the interpretation of the 1984 Amended Consent Decree.[33]

In light of the foregoing, this Court concludes that Plaintiffs have failed to establish that the Amended Consent Decree was unnecessary or that an alternate remedy would have been more effective. Therefore, the Court now addresses the second factor pertaining to the narrowly tailored issue.

2. The Duration and Flexibility of the Relief

In considering the duration of a race-based program, the Court must determine whether the program was "appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'" *Assoc. General Contractors*, 214 F.3d at 730 (citing *Adarand*, 515 U.S. at 237-38). Thus, limiting the duration of such a remedy, "is a keystone of a narrowly tailored plan. . . . " *Young*, 989 F.2d at 228. The Sixth Circuit has noted, however, that while "a consent decree operating in perpetuity may not be the most effective way" to eradicate discrimination, courts "must remain true to the wording and

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33 Plaintiffs also addressed this argument in a TRO hearing held on May 18, 1994. At the hearing, Judge Thomas stated that he "[does] not believe that the argument is supportable." (Doc. # 83, Ex. C. at 72)

intent of such decrees, until their goals are met." *Jansen v. City of Cincinnati*, 977 F.2d 238, 246 (6th Cir. 1992). Moreover, a lengthy duration alone does not automatically invalidate a consent decree. *Ashton*, 49 F. Supp.2d at 1066. In determining flexibility, courts often consider whether a race-based program provides a waiver in the event that sufficient numbers of qualified minorities are not available for hire or promotion. *Middleton*, 92 F.3d at 411.

a. The Duration of the Relief

In this case, Plaintiffs initially contend that the duration of the Amended Consent Decree was too long, and the hiring goal outlined therein had been met prior to 1992. In support of this position, Plaintiffs rely upon the decisions in *Detroit Police Officers Association v. Young*, 989 F.2d 225 (6th Cir. 1993), *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993), *F. Buddie Contracting Ltd. v. Cuyahoga Community College District*, 31 F. Supp.2d 571 (N.D. Ohio 1998), and *Middleton v. City of Flint*, 92 F.3d 396 (6th Cir. 1996). Plaintiffs contend that these cases directly support the proposition that the race-based plan at issue extended for an unreasonable period of time.[34]

The cases relied upon by Plaintiffs, however, are not analogous to the instant case. In those cases, the courts found troublesome the fact that the race-based remedies were

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34 Plaintiffs state, for example, in *Brunet*, the Sixth Circuit concluded that the discrimination against women in the Columbus Fire Department prior to 1975 was "too remote to support a compelling governmental interest to justify the affirmative action plan embodied in the consent decree." *Brunet*, 1 F.3d at 409. In finding the affirmative action plan in *Middleton* not narrowly tailored, the Sixth Circuit noted that the plan's duration of more than nine years was not justified. *Middleton*, 92 F.3d at 411-12. Thus, Plaintiffs contend that these decisions support their argument that the remedy at issue here was too lengthy in duration.

on-going, and in some cases, the goals set forth in the race-based remedy had previously been attained. *See Young*, 989 F.2d at 227 (stating that under the circumstances of the case, the goal of 50% black and minority sergeants had been attained by the time of the court's order); *Middleton*, 92 F.3d at 411 (finding that the City of Flint's race-based promotional plan, which existed for more than nine years, was extreme in light of the fact that the plan continued even after the percentage of minority sergeants in the police force was higher than the percentage of minority entry-level officers).

The Sixth Circuit most recently considered the narrowly tailored issue in *Associate General Contractors of Ohio*, in which it struck down Ohio's Minority Business Enterprise Act ("MBEA"). In finding that the racial preferences within the MBEA were not narrowly tailored to remedy prior discrimination, the Sixth Circuit stated as follows:

> Narrow tailoring also implies some sensitivity to the possibility that a program might someday have satisfied its purposes. . . .The district court in this case took note of the outdated character of any evidence that might have been marshaled in support of the MBEA and added that even if such data had been sufficient to justify the statute twenty years ago, it would not suffice to continue to justify it forever. During the debate over the bill in 1980, an amendment had been offered to include a three-year "sunset" provision; this was defeated. The MBEA has *remained in effect for twenty years and has no set expiration*. This despite, at best, marginally adequate evidence of discrimination from 1975, 1978, and 1979. . . . Ohio concedes this deficiency.

214 F.3d at 737-38 (emphasis added).

In the instant case, unlike the cases relied upon by Plaintiffs, the race-based remedy at issue herein contained a "sunset" provision. Furthermore, the record establishes that, at the time the Amended Consent Decree was extended in 1992, the 33% minority hiring goal outlined in the Decree had not been attained and, in fact, would not be attained until 1994.

Initially, the *Shield* litigants entered into a Consent Decree on November 11, 1977 for the purposes of remedying the present effects of past discrimination identified within the CPD. (Doc. # 79, Ex. B) However, on December 21, 1984, following six days of evidentiary hearings, the parties presented Judge Thomas with a proposed Amended Consent Decree. *Id.*, Ex. D. The Amended Consent Decree, unlike the original Consent Decree, pertained only to the CPD's hiring practices, as Judge Thomas concluded that the City had met its goals pertaining to promotions within the CPD. Furthermore, the hiring goal of 35.8% contained within the original Consent Decree was changed to 33% in the Amended Consent Decree.

As previously stated in this Memorandum Opinion and Order, the Amended Consent Decree provided for certain temporary measures in order to remedy the present effects of the past discrimination identified within the CPD's hiring practices. In particular, the Amended Consent Decree stated as follows:

> [t]emporarily and until such time as 33% of the police officers employed by the City are minorities or until December 31, 1992 (eight years), whichever time or event occurs first, defendants shall hire no less than three minority police patrol officers for every four non-minority police patrol officers. . . .

Id. ¶ 4(a). The Amended Consent Decree also stated that:

> [i]n the event the defendants fail to hire a minimum number of 70 police patrol officers in any of the eight calendar years beginning January 1, 1985 and ending December 31, 1992, the hiring ratio described in Paragraph 4(a), above shall continue in full force and effect for one additional year for each year in which the City shall fail to hire the minimum number of police patrol officers, unless the City has otherwise achieved the 33% level set forth in Paragraph 4(a). . .
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Id. ¶ 4(b). Because the City failed to hire at least 70 officers in 1986 and 1991, the Amended Consent Decree was extended until 1994, or until the City had achieved the 33% level of minorities.

As evident from the provisions of the Amended Consent Decree outlined above, it is clear that the parties did not intend for the Amended Consent Decree to last "in perpetuity." *See Jansen*, 977 F.2d at 246. On the contrary, the Amended Consent Decree provides a set expiration for either the moment the 33% minority hiring goal is achieved or December 31, 1992, whichever occurs first. Because the additional requirement in the Amended Consent Decree necessitating the hiring of a minimum of 70 new patrol officers per year had not been met as of 1992, the Amended Consent Decree was extended by virtue of its own terms. This extension, however, in and of itself, did not imply that the Amended Consent Decree would continue on forever. Rather, the parties were still bound by the 33% hiring goal, which had not been met at that time.

The statistical evidence demonstrates, as indicated in Table 1, that in 1985, the percentage of minorities within the CPD was 22.2%. That percentage slowly increased

throughout the next several years. In 1992, the year that the Amended Consent Decree was scheduled to expire, the CPD consisted of only 29.6% minorities, falling short of the hiring goal established in the Decree by 3.4%. The data also demonstrates that in July of 1994, the hiring goal had finally been met; the level of minorities within the CPD had reached 33.1%. Thereafter, Judge Thomas terminated the Amended Consent Decree, concluding that not only did the Amended Consent Decree expire "in accordance with the provisions [of the Amended Consent Decree] governing its duration," the City had "fully complied with the requirements [of the Amended Consent Decree]." (Doc. # 79, Ex. M ¶¶ 1,3)

In light of the foregoing, it is evident that the 1984 Amended Consent Decree was created with the specific and limited purpose of remedying the effects of past discrimination within the hiring practices of the CPD. As a result, the parties entered into the court-approved Amended Consent Decree which outlined various temporary measures which would effectuate the goals outlined therein, including the 33% minority hiring goal. As the statistical evidence demonstrates, the 33% goal had not been attained in 1992, the year in which the Amended Consent Decree was scheduled to expire. Therefore, because the goal had not been attained, the parties extended the Amended Consent Decree until 1994. The record reflects that when the Amended Consent Decree had finally satisfied its purpose in remedying past discrimination and the CPD had reached a minority workforce of at least 33%, the race-based relief was terminated.

As such, this Court finds that the race-based remedy contained within the Amended Consent Decree, as modified by the parties following six days of evidentiary hearings, did not last longer than the discriminatory effects it was designed to eliminate. While the initial remedy began long before the 1984 Amended Consent Decree, as Defendants concede, the

remedy was significantly modified in 1984. Thus, the Amended Consent Decree, as modified in relation to the original Consent Decree, was appropriately limited. Moreover, not only did the Amended Consent Decree contain a "sunset" provision, or an expiration date, it did, in fact, expire. Therefore, the arguably long life of the Amended Consent Decree is insufficient evidence that the relief outlined therein was not narrowly tailored, especially in light of the statistical evidence presented.

b. The Flexibility of the Relief

Plaintiffs also allege that the Amended Consent Decree was not narrowly tailored because it was inflexible. In particular, Plaintiffs state that the Amended Consent Decree lacked any "meaningful waiver provisions," and the requirement of 70 new hires bore "no relationship to any legitimate minority hiring goals." (Doc. # 77 at 31) This Court, however, finds Plaintiffs' argument to be without merit.

In addressing the flexibility of raced-based relief, particularly concerning whether the relief contained a waiver provision, courts have emphasized the importance of the qualifications of minorities to be hired as a result of the remedy. *See Paradise*, 480 U.S. at 177-78; *Middleton*, 92 F.3d at 411; *Ashton*, 49 F. Supp.2d at 1063-65. In *Paradise*, the Supreme Court found that a one-for-one (or 50%) hiring requirement within the Alabama Department of Public Safety was flexible in that the requirement may be waived "if no qualified black candidates are available." 480 U.S. at 177. The Supreme Court stated that "[t]he Department has, for example, been permitted to promote only white troopers to the ranks of lieutenant and captain since no black troopers have qualified for those positions." *Id.*

In *Middleton*, the Sixth Circuit found that the City of

Flint's plan, whereby 50% of all police officers who were promoted to sergeant were required to be members of a specified minority group, "was not sufficiently flexible to meet the requirements of strict scrutiny." 92 F.3d at 411. In particular, the Sixth Circuit concluded that, while the plan claimed to contain flexible goals which would "not result in unqualified persons being appointed," it "seem[ed] to 'pay lip service'" to the importance of hiring or promoting qualified minorities. *Id.* In finding that the terms of the plan contained only conclusory assertions of flexibility, the *Middleton* Court stated as follows:

> The operational terms of the plan are different. In Flint, for a police officer to qualify for promotion to sergeant, an applicant must take an examination and emerge, in conjunction with other factors, with a minimum score of 70. That grade is stated as the dividing line that distinguishes the "qualified" candidate from the "unqualified" candidate. However, Flint has, in fact, created a free-floating passing standard, at one time awarding as many as ten bonus points to all test-takers, thereby altering otherwise failing grades as low as 60 into qualifying" scores. . . .We also note that an upward alteration of only an additional five points would have turned another six "unqualified" candidates into "qualified" ones . . . .This "flexibility" with grading destroys the city's claim that its plan flexibly waives the 1:1 requirement so that it "shall not result in unqualified persons being appointed to positions."

Id.

In addition, in *Ashton*, the district court stressed the importance of the fact that the affirmative action plan did not compel the City to promote unqualified minorities in order to meet the needs of such relief. 49 F. Supp.2d at 1063-65. In

reviewing the evidence presented, the *Ashton* Court stated as follows:

> The two black patrol officers who tested positive for drug use were ranked numbers 96 and 118 on the 1988 composite score list. The officer who ranked number 118 was the twenty-first highest scoring black out of sixty-nine black patrol officer candidates. Thus, forty-eight more black patrol officers who competed in the 1988 process scored lower than that officer, but were nevertheless otherwise eligible for promotion. Had the two officers who tested positive for drugs not been qualified, the City could have merely skipped over those candidates and selected lower scoring blacks from further down the list. . . .

Id. at 1064. Thus, the *Ashton* Court found "no evidence to suggest that the City was forced into promoting unqualified black patrol officers in order to implement affirmative action." *Id.*

Applying those standards to the facts of this case, the Court finds that the Amended Consent Decree contained such a waiver provision as noted above. By its very terms, the Amended Consent Decree precluded the City from hiring unqualified candidates. As set forth in the Amended Consent Decree, the purpose of its race-based relief was to "foster the employment of qualified minority police patrol officers." (Doc. # 77, Ex. B ¶ 4) In addition, the Amended Consent Decree provided for the maintenance of separate lists of minorities and non-minorities "otherwise qualified" for the position of police patrol officer. *Id.* ¶ 4(a)(5). Moreover, the Amended Decree also provided for the administration of new entrance examinations and new eligibility lists resulting therefrom, "[s]hould the defendants exhaust the pool of qualified minority candidates from any

given list." *Id.* ¶ 4(c).

This Court finds it apparent from the terms of the Amended Consent Decree that hiring *qualified* candidates was a requirement of such race-based relief. More importantly, Plaintiffs have failed to present any evidence to suggest that the City was compelled to hire unqualified minorities in order to meet the needs of the Amended Consent Decree.[35] In fact, with regards to the entrance examination, Dr. Norman Henderson testified that the 1992 Police Patrol Officer Examination was graded in an identical manner for all applicants. (Doc. # 79, Ex. Q ¶ 3) In his Affidavit, Dr. Henderson states that:

> [n]either the scanner nor the computer program used any information about the applicants' race, sex, age nor any other demographic variable in raw scoring or in the computer grade conversions. Neither step involved the identification of applicants in any manner. No modifications were made to answer sheets and no modifications were made to the grades assigned by the computer program. In sum, the entire grading process was done blind with respect to all aspects of applicant identification.

Id. Thus, even if the City had chosen to hire non-qualified candidates (at least based upon their test scores), the City could not have elected to benefit one race over the other because that information was not available, as evident from Dr. Henderson's testimony.

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35 In this case, Plaintiffs initially claimed that the City was hiring unqualified minorities over qualified non-minorities simply to meet the needs of the race-based relief outlined in the Amended Consent Decree. However, following extensive discovery into applicants' personnel records, existing police officers' employment records, and eligibility lists, Plaintiffs elected not to pursue such claim.

Plaintiffs also claim that the Amended Consent Decree's requirement of 70 minimum new hires per year demonstrates the lack of flexibility in the Amended Consent Decree. More specifically, Plaintiffs state that the Amended Consent Decree "requires that 70 persons be hired per year or that year would not be considered towards achieving the goals of the Decree. . . ." (Doc. # 77 at 31) This argument, however, is not well supported in the record.

Another factor to consider in terms of flexibility, besides whether the remedy contains a waiver provision, is whether the City is required to hire black patrol officers regardless of whether officers are needed within the workforce. *See Ashton*, 49 F. Supp.2d at 1065; *Paradise*, 480 U.S. at 177-78. Both the *Ashton* Court and the *Paradise* Court, in finding race-based relief narrowly tailored, stressed the fact that the respective remedies did not "absolutely require" the City to promote black patrol officers or troopers. *See id.*

> The same is true in the instant case. The Amended Consent Decree provided as follows:
>
> In the event the defendants fail to hire a minimum number of 70 police patrol officers in any of the eight calendar years beginning January 1, 1985 and ending December 31, 1992, the hiring ratio . . . shall continue in full force and effect for one additional year for each year in which the City shall fail to hire the minimum number of police patrol officers, unless the City has otherwise achieved the 33% level. . . .

(Doc. # 77, Ex. B ¶ 4(b)) This provision of the Amended Consent Decree does not require the City to hire 70 officers; rather, it provides that if the City does not hire 70 officers in one year, the relief shall continue an additional year. In

other words, if the City cannot meet the terms of the Amended Consent Decree for a particular year, the Amended Consent Decree provides the City with another chance to do so for another year. If anything, this is evidence of the flexibility of the Amended Consent Decree. *See Local 28 Sheet Metal Workers*, 478 U.S. at 487-88 (Powell, J., concurring) (stating the fact that the original goal was delayed twice is evidence of the plan's flexibility). The Amended Consent Decree does not ignore "external forces" beyond the City's control and, thus, the City is not required to hire a certain number of officers just for the sake of complying with the Amended Consent Decree. *See Paradise*, 480 U.S. at 178.

Therefore, in light of the foregoing discussion, this Court finds that the City was not compelled to hire unqualified police patrol officers in order to meet the 33% minority hiring goal of the Amended Consent Decree. Furthermore, the Court finds that the Amended Consent Decree did not mandate that the City hire minority officers, despite the needs of the City, merely to satisfy the race-based relief. As such, this Court finds that the Amended Consent Decree was flexible.

3. The Relationship of the Numerical Goal to the Relevant Labor Market

Another factor that the Court must consider in determining whether the remedy contained in the Amended Consent Decree was narrowly tailored to the achievement of the compelling interest is the relationship of the numerical goal to the relevant labor market. *See id.* at 171. The relevant labor market is defined as the number of applicants who were actually qualified for the job. *See Ashton*, 49 F. Supp.2d at 1069 (citing *Hazelwood*, 433 U.S. at 308, n. 13). This is also referred to as the qualified labor pool. *See id.* at 1068, n. 19 (stating that courts focusing on the

constitutionality of employment actions made under an affirmative action program define the relevant labor market as the pool of qualified candidates).

In determining what constitutes the relevant labor market, or qualified labor pool, for the position of patrol officer, however, the Court must keep in mind that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Croson*, 488 U.S. at 501 (internal citation omitted). With respect to this issue, the Sixth Circuit has recognized that, "'[s]pecial qualifications,' then, winnow out a large enough portion of the general workforce to create a real possibility that the qualified labor pool for the position will have a materially different racial composition than that of the general workforce." *Aiken*, 37 F. 3d at 1165. In light of this winnowing effect, in this case, the Court shall look to the percentage of minorities qualified for the CPD patrol officer position, as opposed to the percentage of minorities in the City of Cleveland or Cuyahoga County in general, in order to determine whether the Amended Consent Decree's ultimate goal of 33% caused the minority population in the CPD to be greater than it would have been if no discrimination had occurred. *See id.* at 1167. The Court engages in this inquiry by also looking to the applicant flow data, which is comprised of the actual percentage of minorities and non-minorities applying for the patrol officer position.[36] *See*

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36 In examining this portion of the strict scrutiny analysis, this Court notes that the relevant case law does not provide an exact formula to apply to determine the relationship of the numerical goal to the relevant labor market. Rather, the Supreme Court has directed district courts to fashion an appropriate equitable remedial measure consistent with the evidence presented and with consideration given to the arguments of the parties. Accordingly, a district judge is given considerable discretion in

Hazelwood, 433 U.S. at 307, n.13.

In this case, Plaintiffs argue that relevant labor market as determined in both the original Consent Decree and the Amended Consent Decree are over-broad, resulting in a race-conscious classification that extends beyond remedying past discrimination. (Doc. # 77 at 17-21) With respect to the Consent Decree established in 1977, Plaintiffs state that the relevant labor market is incorrectly defined by looking solely to the 1970 census figures, as opposed to taking into account other factors, such as age and education. *Id.* at 20. Although Plaintiffs claim that they "do not challenge the 1977 Consent Decree," they state that "the analysis of the labor market used therein is relevant because the 1984 Amended Consent Decree accepts without question the numbers used in the 1977 Consent Decree." *Id.* at 20-21. Plaintiffs, therefore, assert that a fatal flaw in the Amended Consent Decree is its purported adoption of the 33% goal without consideration of the fourteen years of population change, which occurred after the 1970 census figures were established. *Id.*

With respect to what figures should be used by the Court in examining this factor in the narrowly tailored analysis, Plaintiffs state that "the relevant labor pool *must* be defined by those who *actually passed* the [entrance examination]." (Doc. # 81 at 15-16) (emphasis in original). Plaintiffs point to no evidence in the record to support this position; rather, they merely argue that the City's approach "blatantly disregards the fact that actually *passing* the exam is a mandatory pre-requisite to be employed with the [CPD]." *Id.* at 14 (emphasis in original). Thus, Plaintiffs claim that when using their definition of the relevant labor market or qualified labor pool, the goal of 33% contained in

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ordering a suitable remedy based upon his intimate knowledge of the facts and circumstances of the case.

the Amended Consent Decree exceeded the actual percentage of qualified applicants. *Id.* at 16.

To the contrary, Defendants argue that the qualified labor pool is based upon the percentage of minorities who took, rather than passed, the entrance examination for the patrol officer position. In support of this position, Defendants provide expert testimony of Dr. Gerald V. Barrett. (Doc. # 79, Ex. S) In his sworn affidavit, Dr. Barrett states that, upon review of the relevant information contained in the CPD's records, the qualified labor pool should be based upon the minimum qualifications for age, education, and actually taking the examination. *Id.* ¶¶ 5-6. Dr. Barrett noted that this definition, by nature, includes various additional qualifications for taking the 1992 examination. *Id.* These additional qualifications consisted of: (1) a physical abilities examination; (2) drug screening; (3) a background investigation; (4) a psychological evaluation; and (5) a medical examination. *Id.* Thus, in his sworn statement, Dr. Barrett testifies that it is his professional opinion that the most appropriate estimate of the relevant labor market, or the qualified labor pool, for the 1992 CPD entrance examination is the non-minority and minority percentages of those who actually took the examination. *Id.*[37]

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37 Defendants also argue that this definition of the qualified labor pool applies because:

> There is nothing in the record to suggest that the cutoff score for passing [the entrance examination] was [based on] anything other than an administrative convenience. Indeed, the cutoff score for passing was merely based on, and related to, the Civil Service rule requiring a cutoff score of 70 to be deemed to have passed. There is nothing in the record to even suggest that this "cutoff" is relevant to the actual or predicted ability to perform as a patrol officer or successfully complete the Academy. Rather, it is merely an

In light of this expert testimony, Defendants provide this Court with a comparison chart previously set forth in this Memorandum Opinion and Order. For purposes of convenience, this Court, once again, sets forth that chart here. Defendants' chart demonstrates the disparities in the relevant figures under the parties' respective definitions of the relevant labor market or qualified labor pool. The chart is as follows:

Year	% of Minorities Who Qualified to Sit For & Took the Entrance Examination (Defendants' Qualified Labor Pool)	% of Minorities Who Passed Civil Service Test (Plaintiffs' Qualified Labor Pool)	% of Minorities in the Work Force
1982	49.10%	47.30%	19.70%
1989	52.30%	45.60%	25.00%
1992	41.50%	30.60%	29.60%
1994	41.00%	33.70%	31.90%

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administrative convenience to limit the pool from which officers are selected.

(Doc. # 83 at 12) (citing Wilson Aff. at Ex. B).

Year	# of Individuals Who Qualified for and Took Entrance Examination	# of Individuals Who Passed Entrance Examination	# of Minorities Who Qualified to Sit For and Took Entrance Examination	# of Minorities Who Passed the Civil Service Test
1982	2378	2213	1167	1046
1989	1584	1343	828	612
1992	2600	1811	1079	554
1994	2950	2500	1207	843

(Doc. # 84 at 4) Referencing this chart, Defendants state that, even if the Court considers Plaintiffs' definition of the qualified labor pool, and thus looks to those who actually passed the entrance examination, the 33% goal contained in the Amended Consent Decree is closely related thereto. Defendants also state that under either parties' definition:

> *[a]t no time prior to the termination of the decree* did the percentage of minorities in the police department ever equal the percentage of minorities in the qualified applicant pool. In other words, the Amended [Consent] Decree accomplished precisely what it set out to do; once the statistical disparity ended, so did the [Amended] Consent Decree. Given the long road traveled by the City and the Federal Court in this experience, a journey that began with less than a 9% minority representation in the City's police force and repeated findings of de facto and intentional discrimination, and further given the amendments to the [Amended Consent] Decree following the lengthy 1984 hearing, the evolutionary

> tailoring of the [Amended Consent] Decree cannot be seriously disputed.

(Doc. # 89 at 9) (emphasis in original). Thus, according to Defendants, the 33% goal in the Amended Consent Decree was constitutionally valid.

In this case, Plaintiffs bear the burden of demonstrating that the use of the race-conscious remedy was not narrowly tailored to achieve the compelling interest because the numerical goal of 33% was not closely related to the relevant labor market. This Court finds that Plaintiffs fail to satisfy this burden. Upon examination of the record on this issue, the Court finds that the numerical goal of 33% set forth in Amended Consent Decree had a reasonable relationship to the relevant labor market under either parties' definition. Stated another way, the numerical goal contained in the Amended Consent Decree was not over-broad when compared to the relevant labor market as defined by Plaintiffs or Defendants.

Using Plaintiffs' definition, and thus considering the percentage of minorities who passed the entrance examination in a given year, in 1982, the qualified labor pool was 47.3%, and minorities represented only 19.7% of the CPD's workforce. In 1989, using this same definition, the qualified labor pool was 45.6%, as compared to the CPD's minority population of 25%. In 1992, the percentage of minorities who passed the entrance examination was 30.6%, while the CPD workforce minority population of 29.6%. Finally, in January, 1994, the year the Amended Consent Decree was terminated, the percentage of minorities who passed the entrance examination was 33.7%, whereas the CPD's minority representation was 31.90%. When viewed in totality, the statistics using Plaintiffs' definition of the qualified labor pool constitute the following:

Year	Plaintiffs' Qualified Labor Pool	CPD's Minority Workforce	CPD Minority Composition Goal
1982	47.30%	19.70%	35.80%
1989	45.60%	25.00%	33.00%
1992	30.60%	29.60%	33.00%
January 1994	33.70%	31.90%	33.00%

Based upon these figures, this Court finds that, as to each year mentioned, there is a disparity between the percentage of minorities in the CPD's workforce and the percentage of those in the qualified labor pool. That is, the CPD's minority composition in each year was lower than the percentage of applicants qualified for the position in terms of passing the entrance examination, until July, 1994, when the CPD achieved its 33% minority composition goal. This under-representation of minorities reflected by Plaintiffs' own data demonstrates that the 33% goal in the Amended Consent Decree was reasonably related to the relevant labor market.

In addition, the Court notes that the narrowing margin between the percentage of minorities in the qualified labor pool and the percentage of minorities in the CPD's workforce in 1992 was the result of years of operating under the guidance of the Consent Decree and Amended Consent Decree. Significantly, however, the percentage of minorities in the CPD's workforce still fell short of satisfying the 33% minority composition goal adopted by Judge Thomas after the six-day evidentiary hearing in 1984. This can be clearly seen when looking to relevant applicant flow data in the

"Final Report on the Development and Administration of the 1992 Entry Level Police Examination for the City of Cleveland," by Norman D. Henderson, PhD.

This report reflects that in 1992, a total of 2035 non-minorities applied for the patrol officer position; of that number, only 1521 applicants took the examination; and 1257 passed and, thus, gained a position on the 1992 eligibility list. In contrast, in the same year, 1498 minorities applied for the position; of those individuals, only 1079 took the examination; and 554 passed. In comparing the 1257 non-minority applicants who passed the examination to the 554 minority applicants who passed the examination, the report reveals that only 30.6% of those who qualified, in terms of passing the examination, were minorities during that year.[38] Thus, the fact that the margin was narrowing between the figures indicates that, not only was the remedy still necessary, but it was successful in alleviating past discrimination and, thus, raising the overall percentage of the minority workforce within the CPD. This is especially evident in light of the fact that, upon the commencement of the *Shield* litigation, the CPD's workforce consisted of less than 9% minority representation.

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38 Plaintiffs argue that this applicant flow data demonstrates that the remedy was not narrowly tailored. Plaintiffs base this proposition upon their assertion that the 30.6% mentioned was less than "the hiring quota of 42.8%," which was three minorities for every four non-minorities hired, as outlined in the Amended Consent Decree. (Doc. # 77 at 20) As this Court later examines in this Memorandum Opinion and Order, the 42.85% is not the ultimate goal of the Amended Consent Decree; rather, that figure merely serves to monitor the speed at which the CPD would achieve the 33% goal. Accordingly, the Court finds Plaintiffs argument that the number of qualified minorities in 1992 was lower than "the hiring quota" for that year to be without merit. Moreover, the Court notes that Judge Thomas found the speed of 42.85% to be appropriate and reasonable after the 6-day hearing on this issue in 1984.

Moreover, under Defendants' definition of the qualified labor pool, which is supported by the expert testimony of Dr. Barrett, the 33% goal in the Amended Consent Decree is reasonably related to the relevant labor market. Using Defendants' figures, which are supported by the evidence in the record, in 1982, the year of the last entrance examination prior to the modification and extension of the Consent Decree, the percentage of minorities qualified to sit for the entrance examination, and who took that examination, was 49.10%, as compared to the 19.7% of minorities in the CPD's workforce. In 1989, the qualified labor pool was 52.3%, while the percentage of minorities in the CPD's workforce was just 25%. For 1992, under Defendants' definition, the qualified labor pool was 41.50%, in relation to the CPD's minority population of 29.60%. Lastly, in January, 1994, the year the Amended Consent Decree expired, Defendants' qualified labor pool was 41%, and the CPD's minority representation was 31.90%. Looking at those numbers in their totality, Defendants' statistical evidence on this issue constitutes the following:

Year	Defendants' Qualified Labor Pool	CPD's Minority Population	CPD Minority Composition Goal
1982	49.10%	19.70%	35.80%
1989	52.30%	25.00%	33.00%
1992	41.50%	29.60%	33.00%
January 1994	41.00%	31.90%	33.00%
July 1994	41.00%	33.10%	33.00%

Thus, as Defendants assert, and the record reflects, it was not until July, 1994, when Amended Consent Decree was terminated, that the CPD ultimately achieved its overall goal of 33% minority representation. In reviewing Defendants' statistical data, as outlined above, the Court finds Defendants' argument on this issue, based upon the expert testimony of Dr. Barrett, to be meritorious.

Furthermore, the Court notes that Judge Thomas determined that, after numerous years of presiding over the *Shield* case, and after six days of testimony and evidence on the *Shield* Plaintiffs' Motion to Modify and Extend the original Consent Decree, the 33% goal was reasonably related to the relevant labor market at the time of the Amended Consent Decree. Contrary to Plaintiffs' assertion, Judge Thomas adopted the 33% overall goal not by merely looking to the 1977 Consent Decree; rather, Judge Thomas adopted the 33% goal after examining the statistical disparities in the qualified labor pool as compared to the minority representation within the CPD presented by the parties during the six-day hearing. Further evidence of this reasonableness is the fact that, as the result of the six-day hearing, the hiring goal of 35.8% initially set forth in 1977 Consent Decree was changed to 33% in the 1984 Amended Consent Decree. Moreover, as with Plaintiffs' figures, Defendants' figures reflect that the minority population within the CPD was lower than the qualified labor pool in each given year. Significantly, while Defendants provide this Court with admissible evidence to support their figures demonstrating a reasonable relationship between the relevant labor market and the numerical goal, Plaintiffs fail to provide this Court with any evidence to demonstrate a disparity with respect to those figures. Based upon the figures in evidence presented by Defendants, the Court finds that the ultimate workforce composition goal of 33% was not over-inclusive, resulting in the minority representation in the CPD to be greater than it would have been if no discrimination had

occurred.

The Court, however, does not end its inquiry with this determination. Plaintiffs also contend that the applicant flow data, as stated in Dr. Henderson's report, establishes that 30.6% of the qualified applicants were minorities, while the Amended Consent Decree in effect in 1992 "requires a hiring quota of 42.8% 'minority.'" (Doc. # 77 at 20) Thus, the numerical goal, as Plaintiffs assert, is not reasonably related to the relevant labor market.

In the first place, Plaintiffs' comparison is misplaced. The 42.8% (or 42.85% as previously reflected in this Memorandum Opinion and Order) represents the speed at which the City could realize its minority hiring goal of 33%. *See Paradise*, 480 U.S. at 177. The 42.85% figure is the percentage of minorities hired: 3 minorities hired for every 4 non-minorities hired. It is not the "hiring quota," as Plaintiffs mistakenly contend.

Secondly, in reviewing the 42.85% rate set forth in the Amended Consent Decree, the Court finds this figure to be reasonable. Judge Thomas adopted the 42.85% figure in light of his "first-hand experience of the parties and the potential for resistance" to the race-conscious remedy. *Id.* at 181. Furthermore, Judge Thomas determined that the hiring ratio was appropriate to prevent delay in implementing the remedy, while not unduly burdening the interests of non-minority applicants. *Id.* In accordance with applicable Supreme Court precedent, this Court should not "second-guess" Judge Thomas' "carefully considered choice" of the figure necessary to achieve its purpose. *Id.* at 182. Based upon the record in this case, the Court finds that this figure was necessary and reasonable in light of the City's failure, after numerous years, to "eradicate the continuing effects of its own discrimination." *Id.* As such, the speed of 42.85% was warranted in this case.

In sum, this Court finds that the minority hiring goal of 33% within the CPD was reasonably related to the relevant labor market. In addition, the hiring rate of 42.85% was also necessary and reasonable under the facts and circumstances of this case. Accordingly, the Court finds that Plaintiffs have failed to demonstrate that the Amended Consent Decree was not narrowly tailored with respect to the relationship of the numerical goal to the relevant labor market.

4. The Impact of the Relief on the Rights of Third Parties

Finally, Plaintiffs claim that the race-based hiring goals in effect as a result of the Amended Consent Decree, particularly as they relate to the extension in 1992 to 1994, significantly and adversely impacted the approximately 700 named class members. Defendants, on the other hand, are placed in a notably difficult position. In this case, Defendants are forced to defend an affirmative action plan that they repeatedly fought against during the course of the *Shield* litigation. Initially, the City held steadfast in its belief that the CPD did not engage in discrimination, and that affirmative action (by and through the various consent decrees) was not the answer. However, the City eventually surrendered itself to the evolution of the law as it pertained to race-conscious remedial measures. As such, the City now comes before this Court in defense of the court-approved Amended Consent Decree and extension thereof, particularly with respect to its impact upon others.

The Court is mindful of the plight of Plaintiffs, who believe they have been subjected to discrimination on the basis of their race. The use of affirmative action will always place a burden on non-preferred third parties. *See Ashton*, 49 F. Supp.2d at 1073. However, it is this Court's duty to determine whether that burden is an acceptable one. *See id.*

(citing *Paradise*, 480 U.S. at 182). The law is such that hiring goals such as those contained within the Amended Consent Decree may burden innocent individuals, yet the burden is "diffused to a considerable extent among society in general." *Wygant*, 476 U.S. at 282-83. Furthermore, the Supreme Court has found that the denial of future employment, such as the case herein, is not as intrusive as the loss of an existing job. *Id.* at 283.

This Court finds, therefore, that the impact upon Plaintiffs of the race-conscious remedy imposed in the Amended Consent Decree in this case is acceptable under the requirements set forth by the United States Supreme Court. This is especially true in light of the fact that the Amended Consent Decree pertains only to the hiring of police patrol officers, as opposed to the promotions of existing officers wherein the disruption to their lives may be more serious. Furthermore, in this case, there is no evidence that Plaintiffs were prevented from applying with the CPD for future employment. In fact, the record demonstrates that some of the named plaintiffs have, in fact, been hired as police patrol officers subsequent to the filing of the within lawsuit. While their employment and any subsequent benefits may have been delayed, this burden is a minor and reasonable one in light of the current law. Plaintiffs certainly believe that the impact of this race conscious remedy is not an acceptable one to them, and they certainly believe that the possible denial of employment and benefits is neither minor nor reasonable; however, this Court has the duty to follow the law.

The burden in this case is diffused among the relevant labor force. Race-conscious relief, such as the Amended Consent Decree herein, is society's attempt at remedying the present effects of past discrimination. In such a case where society's interests are weighed against the rights and interests of individuals, the law is clear that the

society's interests will prevail to the greater good of humankind. As such, this Court finds that the impact upon Plaintiffs is acceptable in light of the facts and circumstances of this case.

Summary

In accordance with the above, the Court finds that Plaintiffs failed to satisfy their burden of demonstrating, by a preponderance of the evidence, that the City's use of the race-conscious program in selecting patrol officers from the 1992 eligibility list and thereafter was not narrowly tailored to achieve a compelling interest. More specifically, in examining whether the race-conscious remedy at issue was narrowly tailored to serve a compelling governmental interest, the Court made the following determinations: (1) the relief was necessary and Plaintiffs failed to set forth any effective alternative remedies; (2) the relief was reasonable in duration and flexible in nature, in light of its waiver provisions; (3) the numerical goal bore a reasonable relationship to the relevant labor market; and (4) the relief did not have an unreasonable impact on the rights of third parties. In using these factors as a guide for its decision, the Court finds that the remedy at issue in the Amended Consent Decree was narrowly tailored.

IV. CONCLUSION

For the foregoing reasons, this Court finds that the City's use of the race-conscious remedy contained in the Amended Consent Decree in selecting patrol officers from the 1992 eligibility list and thereafter was supported by a compelling interest. In addition, the Court finds that the use of the remedy provided therein was narrowly tailored to achieve that interest. Therefore, Defendants' Motion for Partial Summary Judgment as to Counts I and IV (Doc. # 79) is GRANTED, and Plaintiffs' Motion for Summary

Judgment as to Counts I and IV (Doc. # 77) is thereby DENIED. Counts II, III, and V of Plaintiffs' Amended Complaint remain.

IT IS SO ORDERED.

DONALD C. NUGENT
United States District Judge

DATE _____

No. 04-3904

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JANELL RUTHERFORD, ET AL., Plaintiffs-Appellants,	)	
v.	)	ORDER
CITY OF CLEVELAND, ET AL., Defendant-Appellee.	)	

BEFORE: MOORE, ROGERS, and MCKEAGUE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/S/ Leonard Green
Leonard Green, Clerk

(2)

No. 06-1139

Supreme Court, U.S.
FILED
JUN 1 - 2007
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JANELL RUTHERFORD, et al.,

Petitioners,

v.

CITY OF CLEVELAND, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF ISSUES FOR REVIEW

1. Did an otherwise lawful Amended Consent Decree, entered into after years of contested litigation and following repeated judicial findings of discrimination, become unconstitutional in the final two years prior to its natural expiration, where the mandates of the Amended Consent Decree immediately ceased as soon as the racial composition of the police department reached the percentage of minority applicants in the relevant labor pool?

2. Is an otherwise lawful Amended Consent Decree rendered unlawful because of a provision extending the life of the Amended Consent Decree if a sufficient number of officers (70) are not hired in a given year *and* the work force has not yet reached parity with the qualified labor pool?

3. Under any circumstances, should a political subdivision be answerable in money damages based upon good faith compliance with a lawful Amended Consent Decree, which expired, per a sunset provision in 1994, following an adjudication by the District Judge that same year confirming the constitutionality of the application of the Amended Consent Decree over a final round of police appointments?

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STATEMENT OF THE CASE

On October 12, 1972, a small group of minority Cleveland police officers organized as the "Shield Club" challenged the systematic racial discrimination in the City's recruitment, testing, screening and hiring practices for new police officers, as well as in the assignment, treatment and promotion practices of current officers. [R. 97, October 12, 2000 Order at 3-4, Apx. 71-72.] As the District Court acknowledged, by the time Judge Thomas made judicial findings in the *Shield Club* litigation, the Supreme Court had made it the law of the land that District Court judges had the "*duty* to develop and implement remedial measures designed to end such discrimination." [*Id.*, emphasis added.]

For several years of contentious litigation, the City vigorously defended the charges brought by the Shield Club and lost. The assertions of Appellants notwithstanding, Judge Thomas expressly determined that the City had, for many years, systematically discriminated against African-American and Hispanic applicants and employees. Accordingly, in 1977, the City entered into a Consent Decree regarding hiring and promotions in its Police Department. [R. 79, *Defendants' Motion for Partial Summary Judgment*, Ex. B, Apx. 817-24.]

In 1984, the Shield Club moved to extend the Consent Decree because the City had not met the original Decree's goals. [*Id.*, Ex. D, p. 1, Apx. 826.] The City opposed this Motion as did the two unions representing Cleveland's police officers. Again, the City was unsuccessful. After *six* full days of hearing before Judge Thomas, the City agreed to execute an Amended Consent Decree on December 21, 1984 ("ACD"). The ACD both extended the length of the race-conscious remedy and lowered the ultimate remedial

goal. [*Id.*, Ex. K, Apx. 856-63.] Through the application of the ACD's remedial relief, which included race-conscious *and* race neutral measures, the minority population of the City's police force slowly rose until the remedial goal was achieved in 1994. At that time, pursuant to its terms, the ACD was dissolved.

Despite the City's vigorous defense to the *Shield Club* claims, and despite the City's strict compliance with the decrees adopted by the District Court, a handful of individuals representing the conditionally certified patrol officer class of 1992 (the "Plaintiff-Class" or "Petitioners") sought damages from the City as a result of the City's compliance with the Amended Decree. Try as they might, however, the Plaintiff-Class was unable to dispute that affirmative action consent decrees are not, per se, illegal. Indeed, this Court recently reaffirmed that remedying past discrimination is a "permissible justification for raced-based governmental action." *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003). If ever a consent decree were to pass constitutional muster, it is the one presently before this Court. The District Court and the Sixth Circuit rightly granted and affirmed judgment in the City of Cleveland's favor to prevent the people of Cleveland from being penalized for their commitment to erasing the effects of pervasive discrimination and their compliance with the directives of a federal court.

STATEMENT OF THE FACTS/ PROCEEDINGS BELOW

In the *Shield Club* case, plaintiffs alleged racial discrimination in Cleveland's Police Department ("CPD") against African-Americans and Hispanics. *Shield Club v. City of Cleveland*, 370 F. Supp. 251 (N.D. Ohio 1972).

During the course of this contentious litigation, Judge Thomas issued several orders identifying pervasive racial discrimination in the CPD.

A. Judge Thomas' 1972 Order

In an Order dated December 21, 1972, Judge Thomas held that the 1972 patrol officer entrance examination had a significant racially discriminatory impact upon African-American and Hispanic applicants. *Id.* Because the City could not demonstrate that its test was job-related, Judge Thomas concluded that the appropriate remedy was to direct the CPD to appoint a certain number of African-Americans and Hispanics to the position of patrol officer. *Id.* Judge Thomas also directed the City to employ a validation study and to create an examination that was job-related. *Id.* at 256.

B. Judge Thomas' 1974 Orders

On July 6, 1974, Judge Thomas concluded that the screening procedures used by the CPD had a racially disparate impact upon those few minorities who passed the examination. *Shield Club v. City of Cleveland*, No. C72-1088, 1974 U.S. Dist. LEXIS 7736, at *1 (N.D. Ohio July 6, 1974). In light of the "statistical disparities" evidencing race discrimination, Judge Thomas directed the CPD to institute new screening procedures in order "to devise and to administer screening procedures as racially neutral as the February 1974 entrance examination." *Id.* at *2-4.

Additionally, Judge Thomas held that the CPD must implement an objective plan for administering and publicizing available assignments. *Id.* at *10. Judge Thomas found that the CPD had discriminated in the use of promotional criteria, including examinations and seniority

credit. *Shield Club v. City of Cleveland*, No. C72-1088 (N.D. Ohio July 6, 1974). Accordingly, Judge Thomas directed the City to create new promotional eligibility lists and new promotional examinations, which were to be job-related and validated.

C. Judge Thomas' 1976 Orders

In September 1976, Judge Thomas issued an Order in which he expressly stated that the CPD *intentionally discriminated* in the administration of assignments and transfers. He stated:

> [T]he continuing marked under-representation of minority police officers . . . without explanation or justification, requires the conclusion, now made, *that the Chief of Police had and continues to have a racially discriminatory purpose in perpetuating such marked under representation, and in administering the transfer and assignment process.*

Shield Club v. City of Cleveland, No. C72-1088, 1976 U.S. Dist. LEXIS 13053, at *11 (N.D. Ohio Sept. 27, 1976) (emphasis added). In a second Order issued in September 1976, Judge Thomas found *intentional discrimination* in the making of certain sergeant promotions. *Shield Club v. City of Cleveland*, No. C72-1088 (N.D. Ohio Sept. 29, 1976).

D. The 1977 Consent Decree

1. The terms of the Decree.

On November 11, 1977, following approximately five years of litigation, the City ultimately agreed to enter into a Consent Decree, which was subsequently approved by

Judge Thomas. [R. 79, *Defendants' MPSJ*, Ex. B, Apx. 817-24.]

The Decree was designed to govern the CPD's hiring, transfer and promotion practices. Its very purpose was to "effectuate an effective prospective remedy designed to eliminate *all* vestiges of race discrimination within the [CPD]." [*Id.* ¶1, Apx. 817.] The Consent Decree read:

> This Order follows upon an extended history of hearings, findings, and orders in C72-1088, including but not limited to the following: an order dated December 21, 1972 *finding discrimination in the 1972 entrance examination* (370 F. Supp. 251); an order dated July 6, 1974 *finding discrimination in the defendants' recruitment practices and defendants' post-examination screening practices* (8 E.P.D. ¶ 9614); an order also dated July 6, 1974 finding *discrimination in the 1973 promotional criteria* (examinations and seniority credit) (8 E.P.D. ¶ 9606); an order dated September 27, 1976 finding *intentional discrimination in the administration of assignments and transfers* (14 E.P.D. ¶ 7763); and an order dated September 29, 1976 finding *intentional discrimination in the making of certain Sergeant promotions* in 1975.

[*Id.* ¶2, Apx. 817-18, emphasis added.] It further provided that "[a]s reflected by the entire record in C72-1088 and C77-346, there has been a history of race discrimination in the hiring practices and in the promotion practices of the [CPD]." [*Id.* ¶3, Apx. 818, emphasis added.] As a consequence, the Decree mandated various remedies in an effort to ameliorate "the present effects of past discrimination." [*Id.* ¶¶12, 17, Apx. 819-23.]

With respect to recruitment and hiring, the Decree required the CPD to create a minority recruitment unit

and implement an "intensified recruitment effort" to increase the number of minority applicants. [*Id.* ¶13, Apx.821-22.] The Decree further obligated the City to use "only such selection criteria . . . as are non-discriminatory and demonstrably job-related." [*Id.* ¶9, Apx. 819.] The City also agreed to establish a minority hiring goal of not less than 35.8%; establish an appropriate timetable for achieving that goal; and agreed to hire no less than three minorities for every four non-minority hires. [*Id.* ¶¶9-12, Apx. 819-21.] Critically, in 1977, only *9.2%* of the City's police officers were minorities. [*Id.*, Ex. C, Apx. 825.]

2. The 1977 Consent Decree Approval Hearing.

Judge Thomas held an approval hearing to review the Consent Decree in late 1977. At that hearing, Judge Thomas analyzed whether the *Shield Club* plaintiffs had established a pattern of historic discrimination. Judge Thomas acknowledged his previous ruling, in which he stated that "the entire record [did] not convince [him] that the plaintiffs [had] established a historic pattern of racial discrimination in the [CPD]." *Shield Club*, No. C72-1088, at *9 (N.D. Ohio July 6, 1974). But, Judge Thomas emphasized that such "finding [was] *not engraved in stone.*" [R. 81, *Plaintiffs' Memorandum in Opposition to Defendants' MPSJ*, Ex. E, p. 48, Apx. 959.]

In light of his numerous findings of discrimination, Judge Thomas concluded that "to go all through what evidence was spread on this record for five years" was not necessary. He determined that the record before him was sufficient to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." [*Id.*] He expressed that due to "the complexity, expense and likely duration of such litigation . . . and all

other factors relevant to a full and fair assessment of the wisdom of the proposed compromise," a hearing was not merited. [*Id.*] Therefore, on the basis of his previous rulings and the City's admission of race discrimination, Judge Thomas signed the Decree on November 11, 1977.

E. The 1984 Amended Consent Decree

1. The Shield Club's Motion to Modify the Consent Decree.

On October 25, 1984, the *Shield Club* plaintiffs filed a Motion to Modify and Extend the Consent Decree. [R. 79, *Defendants' MPSJ,* Ex. D, p. 1, Apx. 826.] They claimed that extension was necessary because the City had not met the Decree's goals. [*Id.*] By 1984, only 20.8% of the City's police officers were minority. [*Id.*, Ex. C, Apx. 825.] The City, the FOP and the Cleveland Police Patrolmen's Association opposed plaintiffs' Motion, arguing that the City would not consent to an extension of the Decree and the Court lacked the power to impose such an extension. [*Id.*, Ex. F, p. 4, Apx. 846.]

On November 29, 1984, Judge Thomas denied the *Shield Club* plaintiffs' Motion as it related to promotional practices. Yet, Judge Thomas determined that the Shield Club had raised an issue of fact which might warrant extension of the Consent Decree. [*Id.*, Ex. J, Apx. 852-55.] As a result, the Court conducted six days of hearings in November and December of 1984 to determine whether extended race-conscious relief was required. At the conclusion of hearings, the parties entered into an Amended Consent Decree on December 21, 1984. [*Id.*, Ex. K, Apx. 856-63.]

2. The Terms of the 1984 Amended Consent Decree.

The Amended Decree pertained only to the CPD's hiring practices. The parties agreed that the ACD was intended to "finally and fully resolve these actions so as to preclude any further requests for extension and/or modification . . . " [*Id.*, Ex. K, p. 1, Apx. 856.] Like the original Decree, the ACD directed the City to use "only such selection criteria . . . as are non-discriminatory and demonstrably job-related." [*Id.* ¶2, Apx. 857.]

In pertinent part, to "partially remedy the present effects of past-discrimination," the Amended Decree directed that:

> [t]emporarily and until such time as 33% of the police officers employed by the City are minorities or until December 31, 1992 (eight years), whichever time or event occurs first, defendants shall hire no less than three minority police patrol officers for every four non-minority police patrol officers. . . .

[*Id.* ¶4(a), Apx. 858.] Furthermore, the Amended Decree provided that if the City failed to hire a minimum number of 70 patrol officers in any of the eight calendar years beginning January 1, 1985, and ending December 31, 1992, the hiring ratio described above would continue "in full force and effect for one additional year for each year in which the City shall fail to hire the minimum number of police patrol officers, *unless the City has otherwise achieved the 33% level* . . . " [*Id.* ¶4(b), Apx. 859.] The Amended Decree also authorized the continued use of the one-in-three rule and the use of separate eligibility lists for minority and non-minority candidates. [*Id.* ¶4(c), Apx. 859-60.] Finally, the Amended Decree provided that "[t]he Court's jurisdiction shall not be extended beyond the

periods defined in Paragraphs 4(a) and 4(b), notwithstanding the fact that the purpose of this amended consent decree may not have been fully achieved." [*Id.* ¶11, Apx. 863.]

3. The extension and ultimate termination of the Amended Consent Decree.

After 1984, there were two years in which the City did not hire 70 patrol officers. In 1986, the City hired a total of 48 officers and in 1991, the City hired 64 officers. [R. 77, *Plaintiffs' MPSJ*, Defendants' Admissions, Req. # 23, 29, Apx. 573-74.] Consequently, by its terms, the ACD continued in effect until 1994, at which time the City finally achieved the 33% goal. [R. 79, *Defendants' MPSJ*, Ex. E, p. 3, Apx. 842.] Specifically, Judge Thomas officially terminated the Amended Decree in December 1994, in response to an unopposed motion filed by the FOP. [R. 79, *Defendants' MPSJ*, Ex. M, ¶1, Apx. 864.]

F. The Present Litigation: Janell Rutherford, et al.

1. The Complaint and TRO Hearing.

The Plaintiff-Class filed this class action Complaint and a Motion for a Temporary Restraining Order and for a Preliminary Injunction on May 17, 1994. [*Dist. Ct. Docket Sheet*, Apx. 1; R. 13, *Amended Complaint*, Apx. 37.] At an oral hearing before Judge Thomas on May 18, 1994, the Plaintiff-Class' counsel argued that injunctive relief was necessary to prevent the appointment and hiring of police officers who were certified from a 1992 eligibility list. In denying injunctive relief, Judge Thomas considered whether the Plaintiff-Class had established that the minority hiring preferences in the Amended Decree deprived

them of any basic constitutional rights. [R. 79, *Defendants' MPSJ*, Ex. N, Apx. 874-77.] After reviewing the Supreme Court's decisions in *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989), and *Local No. 93 International Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), and this Court's decisions in *United Black Firefighters Ass'n v. Akron*, 976 F.2d 999 (6th Cir. 1992), and *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013 (6th Cir. 1994), Judge Thomas concluded that "this Court in its consent decrees and in the several *adjudications* that preceded the 1977 consent decree made numerous findings of past discrimination." [R. 79, *Defendants' MPSJ*, Ex. N, pp. 117-19, Apx. 875-77, emphasis added.] In other words, unlike in *Croson* and *United Black Firefighters*, Judge Thomas concluded that "this Court's past discrimination predicate" served as a "constitutional basis for the hiring preference that [he] imposed in the 1977 order and again in the amended December 21, 1984 order." [*Id.*]

2. The Amended Complaint.

On June 3, 1994, the Plaintiff-Class filed a First Amended Complaint. [R. 13, Apx. 37-68.] The Amended Complaint set forth causes of action for violation of rights established by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, and several state law claims. With respect to the Amended Decree, the Plaintiff-Class essentially challenged the validity of the extension of the race-conscious remedy into 1994. In other words, the Plaintiff-Class claimed that the extension of the Amended Decree into 1994 meant that the City hired from an improper

1992 eligibility list in reviewing their applications for police officer positions during that year. [R. 97, *2000 Order* at 30-31, Apx. 98-99.]

3. The District Court grants summary judgment on the constitutionality of the Amended Consent Decree and a Unanimous Sixth Circuit Affirms.

On June 1, 2000, both the Plaintiff-Class and the City filed Motions for Partial Summary Judgment with respect to the constitutionality of the Amended Decree. [R. 77 and 79, Apx. 529-85, 783-816.] By Order dated October 12, 2000, the District Court granted the City's Motion, thereby dismissing the Plaintiff-Class' Equal Protection claims. [R. 97, *2000 Order*, Apx. 69-162.] The District Court held that the City's compliance with the Amended Decree in selecting police officers from the 1992 eligibility list was constitutional. The District Court ruled that the race-conscious relief was supported by a compelling interest to eradicate the present effects of the CPD's past discrimination, and the remedy was narrowly tailored to achieve that goal. [*Id.*][1]

[1] In so holding, the District Court analyzed the racial composition of the "qualified labor pool" at several relevant points during the life of the Amended Decree. [*Id.* at 25-26, Apx. 93-94.] The City defined the qualified labor pool as the percentage of minorities who *took* the police officer entrance examination – a definition the City supported with the expert testimony of Dr. Gerald V. Barrett. [R. 79, *Defendants' MPSJ*, Ex. S, Apx. 880-81.] On the other hand, the Plaintiff-Class argued that the qualified labor pool is based on the percentage of minorities who "*passed*" the entrance examination. However, despite the opportunity to do so, the Plaintiff-Class presented *no* evidence to support that definition. [R. 79, *Defendants' MPSJ*, Apx. 810.]

On appeal, a unanimous Sixth Circuit (with two Judges writing concurring opinions) affirmed and thereafter denied a motion for rehearing en banc. The appellate court held:

> On Appellant's reverse discrimination claim, the City's history of racial discrimination against minorities – as evidenced by its own admission of discrimination, judicial findings, and statistical disparities – provided the City defendants with a compelling interest in implementing the CPD's temporary race-based hiring plan. Given several important features of the plan, especially its sunset provision and flexibility, we also find that the plan was narrowly tailored, and thus survives the strict judicial scrutiny required by the Supreme Court's equal protection jurisprudence.

REASONS FOR DENYING THE WRIT

THE DISTRICT COURT PROPERLY GRANTED AND THE SIXTH CIRCUIT PROPERLY AFFIRMED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS AS THE RACE-CONSCIOUS REMEDY INCORPORATED INTO THE 1984 ACD WAS SUPPORTED BY A COMPELLING INTEREST AND WAS NARROWLY TAILORED TO FURTHER THAT INTEREST.

Implementation of race-conscious measures narrowly tailored to achieve a compelling interest do not violate the Equal Protection Clause. *Grutter v. Bollinger*, 539 U.S. at 328; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. at 507. In *United States v. Paradise*, 480 U.S. 149 (1987), this Court emphasized:

> *[i]n determining whether this order was "narrowly tailored," we must acknowledge the respect*

> *owed a district judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment.* A district court has 'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' 'Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.'

Paradise, 480 U.S. at 184 (emphasis added) (internal citations omitted). The Supreme Court explained that "[t]he district court has firsthand experience with the parties and is best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional commands.'" *Id.* (internal citations omitted).

A. The Race-Conscious Remedy Incorporated into the 1984 Amended Consent Decree Was Supported by the Compelling Interest of Remedying the Present Effects of the Extensive Past Discrimination in the City of Cleveland's Police Department.

The governmental entity in question must "identify precisely the compelling state interest that might be able to overcome the general presumption against racial classification." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986)). The governmental entity must do more than present mere speculation of past *societal* discrimination. *Id.* at 735. Rather, the governmental entity must present a "strong basis in evidence" that its "concern is

with remedying past discrimination." *Croson*, 488 U.S. at 493, 500.[2]

A party may demonstrate a strong basis in evidence by establishing that a court or another competent body made a contemporaneous or antecedent finding of past discrimination. *See, e.g.*, *Wygant*, 476 U.S. at 289 (O'Connor, J., concurring) (agreeing that contemporaneous or antecedent findings of past discrimination is one way to demonstrate a strong basis in evidence, but finding that it is "not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan."). A party may also demonstrate a strong basis in evidence by producing evidence that approaches a prima facie case of a constitutional or statutory violation. *See Croson*, 488 U.S. at 500 (finding the race-conscious remedy unjustified because there was "nothing approaching a prima facie case of a constitutional or statutory violation" to support a conclusion that a remedial action was necessary").

1. The 1977 Consent Decree was supported by strong and convincing evidence of race discrimination in the City of Cleveland's Police Department.

After reviewing the record history of the *Shield Club* litigation, the District Court determined that the 1977 Consent Decree was supported by a compelling

[2] The District and Appellate Courts noted that there was some ambiguity in the relevant precedent regarding the appropriate allocation of the burdens of proof in these cases, particularly after this Court's decision in *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). [R. 97, *2000 Order*, p. 43 fn. 12, Apx. 111.] In this case, the point is moot, as the District Court and Sixth Circuit Court held that the Amended Decree was constitutional no matter how the burden of proof is allocated.

governmental interest. As a whole, Judge Thomas' decisions establish there was egregious and pervasive discrimination in the CPD, including: (1) discrimination in the 1972 entrance exam; (2) discrimination in recruitment practices and screening procedures; (3) discrimination in promotion criteria; (4) discrimination in assignments and transfers; and (5) discrimination in sergeant promotions. [R. 79, *Defendants' MPSJ*, Ex. B, ¶¶2-3, Apx. 817-18; R. 97, *2000 Order* at 48-49, Apx. 116-17.] Indeed, in a 1976 order, Judge Thomas specifically found that Cleveland's "chief of police had and continues to *have a racially discriminatory purpose in perpetuating such marked underrepresentation and in* administering the transfer and assignment process." (14 E.P.D. ¶7763 at 35).

In addition, Judge Thomas also determined that the 1972 examination resulted in a gross statistical disparity resulting in under-representation of minorities. In *Shield Club v. City of Cleveland*, 370 F.Supp. 251, 254 (N.D. Ohio 1972), Judge Thomas held that Plaintiffs were "entitled to injunctive relief" because the test operated as a "built in headwind" for minority groups. For example, in 1974, Judge Thomas found that although 39% of those who passed the exam for patrol officer were minorities, less than 9% of the City's police force was minority at the time. *Shield Club v. City of Cleveland*, 1974 U.S. Dist. LEXIS 7736, 8 E.P.D. ¶9614 (N.D. Ohio 1974 at 5) He made these statistical findings at the same time he determined that police officials did intentionally discriminate in recruitment practices, post examination screening procedures, utilizing promotional criteria, in making substantive promotion decisions and in the administration of assignments and transfers. 14 E.P.D. ¶7763 at 35. Thus, the 1977 Consent Decree was directly supported by compelling

findings of discrimination permeating virtually every personnel decision made in Cleveland's police department.

2. The 1984 ACD was supported by a compelling interest to remedy the lingering effects of the CPD's historical discrimination against minorities.

In 1984, Judge Thomas had the opportunity to re-evaluate the contents of the Consent Decree over the course of a *six-day evidentiary hearing* in light of the Shield Club's Motion to Modify and Extend the Consent Decree. [R. 79, *Defendants' MPSJ*, Ex. D, Apx. 826-39.] Following the completion of that hearing, the parties eliminated the portion of the Consent Decree relating to promotions, demonstrating the parties' recognition that the original hiring goal had not been satisfied. But, the parties recommended, and Judge Thomas approved, a *reduction* in the minority composition goal (*i.e.*, 35.8% to 33.0%).

The Plaintiff-Class' main contention is that evidence of discrimination in the early 1970s was too remote in time to justify the extension of a race-conscious remedy in 1984 and beyond. According to Petitioner, because there was no "reasonably current" evidence that the City *continued* to discriminate against minorities, there was no compelling interest to justify the Amended Decree or its extension to 1994. (*Id.* at 24.) This argument wholly distorts the applicable precedent and the factual record supporting the extension of the race-conscious remedy in 1984.

In *Adarand*, this Court decisively emphasized that:

> we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' The unhappy persistence of *both* the practice *and the lingering*

> *effects* of racial discrimination against minority groups in this country is an unfortunate reality, *and government is not disqualified from acting in response to it.*

Adarand, 515 U.S. at 237 (emphasis added) (citation omitted). Not one case cited by the Plaintiff-Class stands for the proposition that a race-conscious remedy is *only* constitutional if it is supported by evidence that a public entity has *recently* discriminated (or *currently* discriminates) against a protected class. Rather, a government may take race-conscious relief to remedy or eradicate the *present effects* of *past discrimination*. *See Paradise*, 480 U.S. at 167.

As observed by the Sixth Circuit, in affirming summary judgment:

> Appellants also argue that even if there was a compelling interest justifying the race-based remedy in 1977 and 1984, surely there was no such interest in 1993 and 1994. As evidence, they point to the convergence of the CPD's minority police force percentage to the 33% target. Yet, in determining whether the governmental body had a compelling interest, a reviewing court should focus on the evidence of discrimination existing at the time the body enacted the race-based remedy. *See Shaw v. Hunt*, 517 U.S. 899, 910 (1996) (holding that "the institution that makes the racial distinction must have had a strong basis in evidence to conclude that remedial action was necessary, *before* it embarks on an affirmative-action program.") (internal quotation omitted, emphasis in original) . . . Here, the historical and contemporaneous evidence of discrimination in the 1970s and 1980s provided the *Shield Club* parties and the district court with a strong basis

in evidence for the necessity of the original consent decree in 1977 and its amendment in 1984.

Judge Thomas did not order a race-conscious remedy in 1984 based solely on findings of discrimination after the 1970's. Rather, it was the disparity between the number of minority and non-minority police officers that caused Judge Thomas in 1984 to conclude that the CPD's past discrimination *had not yet been remedied*. [R. 79, *Defendants' MPSJ*, Ex. J, Apx. 852-55.] Thus, as the City (and its noted expert Dr. Barrett) argued, in 1982, although the minority qualified labor pool was 49%, only 19.7% of the City's police officers were minority. [*See* Table 2, *supra*; R. 79, *Defendants' MPSJ*, Ex. C, Apx. 825.] This gross disparity continued in 1989 (qualified labor pool of 53% compared to a police force of only 25% minorities); 1992 (41.5% compared to 29.6%); and 1994 (40.9% compared to 31.9%). [*Id.*] This unremedied disparity more than justified the continuation of the race-conscious relief in 1984.

Significantly, the Plaintiff-Class' own statistical analysis – an analysis it proffered without expert testimony – also convincingly establishes that a compelling interest existed to extend the race-conscious relief to eradicate the continued disparity in the City's police force. Using the Plaintiff-Class' approach that the qualified labor pool includes only those minority candidates who "*passed*" the examination, in 1982, the minority qualified labor pool was 47.3%. [R. 79, *Defendants' MPSJ*, Ex. E, Apx. 840-42.] Again, however, minorities only represented 19.7% of the City's police force at that time. In 1989, the Plaintiff-Class' qualified labor pool was 45.6%, while the police force's minority population was only 25%. [*Id.*] Even in 1992, when the Plaintiff-Class alleges that the qualified labor pool was 30.6%, the minority population in the City's police force was below that figure. [R. 79, *Defendants'*

MPSJ, Exs. C and E, Apx. 825, 840-42.] Finally, according to the Plaintiff-Class' theory, it was not until mid-1994 that the qualified labor pool matched the minority population on the City's police force (*i.e.*, 33.7% qualified labor pool compared with 33.7% minority population). [*Id.*]

At no time prior to the termination of the decree did the percentage of minorities in the police department ever equal the percentage of minorities in the qualified applicant pool. In other words, the ACD accomplished precisely what it set out to do; once the statistical disparity ended, so too did the Consent Decree.

B. The Race-Conscious Remedy Incorporated into the 1984 ACD Was Narrowly Tailored to Remedy the Present Effects of the Extensive Past Discrimination in the City of Cleveland's Police Department.

The District Court correctly decided that the race-conscious remedy incorporated into the 1984 Amended Consent Decree was narrowly tailored. To determine whether race-conscious measures are narrowly tailored, courts consider the following factors:

(1) the necessity for the [race-based] relief and the efficacy of alternative remedies;

(2) the flexibility and duration of the relief; including the availability of waiver provisions;

(3) the relationship of the numerical goals to the relevant labor market; and

(4) the impact of the relief on the rights of third parties.

1. The necessity for the race-based relief and the efficacy of alternative remedies.

There is no question that the purpose of race-conscious relief in the 1977 and 1984 consent decrees was to eradicate the present effects of the CPD's discrimination against African-Americans and Hispanics. Specifically, by definition, the race-conscious remedy benefited only groups judicially determined to be victims of the City's discrimination: African-Americans and Hispanics. [R. 79, *Defendants' MPSJ*, Ex. B, ¶7, Apx. 818.]

The race-conscious relief of hiring three minorities for every four non-minorities, or a hiring ratio of approximately 42.85%, was not only necessary, but as discussed below, it was rationally related to the relevant labor market. The Plaintiff-Class asserts that this hiring ratio was unlawful because it exceeded the ultimate hiring goal of 33%. Contrary to this contention, provisions of consent decrees which call for a hiring "ratio" at a larger percentage than the percentage ultimately set forth as the overall goal are valid and constitutional. In *Paradise*, this Court approved a court order which required that 50% of the hirees be minorities until 25% of the work force were minorities. In rejecting a challenge to that framework, the Court noted:

> The Government suggests that the one-for-one requirement is arbitrary because it bears no relationship to the 25% minority labor pool relevant here. This argument ignores that the 50% figure is not itself the goal; rather it represents the *speed* at which the goal of 25% will be achieved.

480 U.S. at 179-80 (emphasis added). Here, the 42.85% hiring ratio was far more closely related to the ultimate goal than was even the case in *Paradise*.

The most telling argument supporting the constitutionality of the ACD is this single, indisputable fact,

highlighted by the District Court and Sixth Circuit: even given the remedy under the ACD, with all of its component parts, the minority representation among Cleveland police officers did not reach the level of minority representation in the relevant labor market until 1994. [R. 79, *Defendants' MPSJ*, Exs. C and E, Apx. 825, 840-42.]

As the Sixth Circuit noted in its affirmance,

> Appellants point to the fact that in 1992, the percentage of minorities in the CPD (29.6%) was closely approaching the 33% target . . . Of course, *any* responsible race-based hiring plan should have as its ultimate goal the attainment of the target at the natural end of the life of the plan. The fact that the percentage of minorities on the CPD's police force was approaching the 33% target near the end of the plan is a testament to the plan's efficacy, not its unconstitutionality.

2. The flexibility of the relief including the availability of waiver provisions.

The Amended Decree was flexible as it did not require the City at any time to hire minority police officers when no officers were needed. *Paradise*, 480 U.S. at 177-78). The decree *only* provided that if the City did not hire 70 employees in any given year, the life of the consent decree would extend for another year. In fact, as evidence of flexibility, Justice Powell, concurring in *Local 28 of Sheet Metal Workers v. EEOC*, 478 U.S. 421, 487-88 (1986), noted that "[a]dditional flexibility is evidenced by the fact that this goal, originally set to be achieved by 1981, has been twice delayed and is now set for 1987."

Furthermore, the Amended Decree is flexible in that it did not require, and indeed precluded, the hiring of unqualified individuals. In fact, by its terms, the Amended

Decree provided that if the City exhausted the pool of qualified candidates, it was required to administer new entrance examinations and prepare new lists. [R. 79, *Defendants' MPSJ*, Ex. K, ¶5(c), Apx. 860-61.]

3. The duration of the relief.

The Plaintiff-Class' argument that the duration of the race-conscious remedy was too long is discredited by the very precedent upon which it relies. In each and every one of those cases, the court was faced with a challenge to an *ongoing* race-conscious remedy, many of which had *already* attained or surpassed their goal or there was no evidentiary predicate to justify ongoing relief. *See, e.g., Adarand*, 515 U.S. at 200; *See also* Cases Cited in Cert Petition: *Quinn v. City of Boston*, 325 F.3d 18 (1st Cir. 2003) (Parity between minority population in labor and job pool achieved *prior* to hirings); *Maryland Troopers Assoc., Inc. v. Evans*, 993 F.2d 1072 (4th Cir. 1993) (No "strong basis in evidence" to warrant race conscious remedy. Accordingly, Court did not even reach question of whether consent decree narrowly tailored); *Dean v. City of Shreveport*, 438 F.3d 448 (5th Cir. 2006) (Case remanded because no evidence of qualified labor pool or any relevant workforce statistics for hiring years at issue. Decree also lacked a sunset provision); *Bennett v. Arrington (In re Birmingham Reverse Discrimination Employment Litigation)*, 20 F.3d 1525 (11th Cir. Ala. 1994) (No statistical evidence of relevant labor market and decree had no sunset provision). What specifically troubled these courts was that although these race-conscious remedies had been ongoing for numerous years, they contained no sunset provisions, or the decree continued after the goals had been met.

Here, at the time of the extension of the race-conscious remedy in 1984, the statistical evidence revealed

that the effects of the City's past discrimination remained unremedied and that the remedial goals had not yet been met. [Table 2; R. 79, *Defendants' MPSJ*, Exs. C and E, Apx. 825, 840-42.] Clearly, the extension of the decree through 1994 did not present issues of constitutional dimension.

4. The relationship of the numerical goals to the relevant labor market.

The City presented uncontroverted evidence that the ACD's workforce goal was relevant to the appropriately defined labor market. Dr. Barrett testified that the qualified applicant pool is properly considered to be those individuals who met the posted qualifications for the exam and demonstrated sufficient interest by actually sitting for and completing the exam itself. [R. 79, *Defendants' MPSJ*, Ex. S, ¶¶4-6, Apx. 880-81.] This, Dr. Barrett concluded, is the appropriate definition of the qualified applicant pool for Cleveland Police entry exams, and thus the relevant labor market to which the force should be compared. [*Id.*] Even a cursory review of the relevant portion of Table 2 establishes that the Amended Decree's 33% numerical goal was related to this relevant labor market. (In fact, it could be logically argued that the 33% goal was *too low*.)

The City's Qualified Labor Pool (from Table 2)

YEAR	% of Minorities Who Qualified to Sit For & Took Civil Service Test	% of Minorities in the CPD
1982	49.10%	19.70%
1989	52.30%	25.00%
1992	41.50%	29.60%
1994	41.00%	31.90%

Citing no legal precedent or expert testimony, the Plaintiff-Class maintains its position that the qualified labor pool must be based on the percentage of minorities who "passed" the entrance examination. [R. 97, *2000 Order*, p. 26, Apx. 94.] As the District Court and Sixth Circuit reasoned, however, the Plaintiff-Class' definition is premised on a critical factual and logical flaw: that the examination's cutoff score is more than just an administrative tool to aid the selection process and somehow reflects an applicant's qualifications to perform as a police officer.[3]

Significantly, even when the relevant labor market is narrowed to a comparison of only those who "passed" the exam, the evidence establishes that the Amended Decree's numerical goal was directly tailored to the relevant labor market.

The Plaintiff-Class' Qualified Labor Pool (from Table 2)

YEAR	% of Minorities Who "Passed" Civil Service Test	% of Minorities in the CPD
1982	47.30%	19.70%
1989	45.60%	25.00%
1992	30.60%	29.60%
1994	33.70%	31.90%

[3] Numerous courts have recognized that the "passing score" has little meaning beyond its administrative usefulness. *See Contreras v. Los Angeles*, 656 F.2d 1267 (9th Cir. 1981); *Bryant v. City of Chicago*, 200 F.3d 1092, 1099 (7th Cir. 2000), *cert. denied*, 531 U.S. 821 (2000); *Lanning v. SEPTA*, 181 F.3d 478, 492-93 (3rd Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000); *Guardians Ass'n v. City of New York*, 630 F.2d 79, 105 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981).

After the 1994 patrol officer examination, the qualified labor pool was 33.7%, while for the very first time, the percentage of minorities on the City's police force also reached 33.7%. Accordingly, even under the Plaintiff-Class' theory, the hiring goal and ultimate workforce composition goal were quite well tailored to the results of the 1992 examination.

5. The impact of the relief on the rights of third parties.

This Court has recognized that race-conscious relief in hiring is different from similar relief applied to promotions, layoffs or recalls. *Paradise*, 480 U.S. at 183; *Wygant*, 476 U.S. at 283. The Sixth Circuit noted that:

> Although initial employment opportunities coupled with hiring goals may burden some innocent individuals, they do not impose the same type of intrusive injuries that layoffs, which result in loss of job expectancy, security, and seniority, involve.

(*Wygant*, 476 U.S. at 283 (stating that the denial of future employment is not as intrusive as the loss of an existing job)).

While non-minority applicants are by definition burdened by any race-conscious remedy, this Court will tolerate burdens that are "acceptable" or "minor" to remedy past discrimination. *Wygant*, 476 U.S. at 283. There is no evidence that any of the Plaintiff-Class members in this case were precluded from sitting for future civil service examinations, and in fact, several of the named class members were subsequently hired as police officers. [R. 97, *2000 Order*, p. 93, Apx. 160.] Finally, from

1994 forward, the Plaintiff-Class no longer suffered any burden because the race-conscious remedy was dissolved.

C. The Two Year Extension of the 1984 ACD's Provisions, Underscores the Decree's Flexibility and Provides No Basis to Invalidate the ACD or Penalize the City for its Good Faith Compliance.

Petitioners rest four (4) of their six (6) Questions Presented to this Court on the fact that the terms of Amended Consent Decree triggered a two year extension of the ACD. In that regard, Petitioners argue that the ACD was not narrowly tailored in that it provided for such an extension. However, as detailed below, the provision in question was purposefully drawn to ensure that the goals were reached as quickly as possible.

Under its terms, the ACD was set to expire on the earlier of December 31, 1992, or when minorities constituted 33% of the Police Department. In addition, the ACD provided that for every four (4) non-minorities hired, three (3) minorities were to be hired. Of course, the ACD required that the only "qualified" candidates were to be hired. In addition, the ACD provided that in the event that the City was to hire less than seventy (70) officers in a given year, the terms of the decree were to be extended for an additional year. However, in accordance with the basic terms of the ACD, the decree was to terminate when minorities constituted 33% of the Police Department.

A race-conscious plan "cannot continue in perpetuity" but must have a logical stopping date. *City of Richmond v. Croson*, 488 U.S. 469, 498 (1989). Here, the ACD had just such a "logical date" and was flexible enough to permit earlier termination if the goals were met. "An explicit or immediately foreseeable end date has never been required

for an affirmative action plan to be valid." *Doe v. Kamehameha Schools*, 470 F.3d 827 (9th Cir. 2006), citing to *Johnson v. Transportation Agency*, 480 U.S. 616, 639 (1987).

Where a race-conscious plan has an expiration date, but is not sufficiently flexible to provide for its earlier termination if its goals are met, such a decree is most likely to be found not to be narrowly tailored. *See, e.g., Davis v. San Francisco*, 890 F.2d 1438 (9th Cir. 1989) ("The decree does not however, contain any provision to stop the use of its promotion mechanism when its valid promotion objectives have been met. . . . [W]e modify the seven-year duration of the decree to seven years or sooner upon the accomplishment of the objectives or the goals of the consent decree". 890 F.2d at 1549.) Similarly, in *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training*, 94 F.3d 1366 (9th Cir. 1996) the Court accepted as narrowly tailored a proposal of the Plaintiff's to establish a gender-conscious plan that would terminate when the goal of having women constitute 20% of the apprentices was met.

The ACD meets these standards. It had a stated end date, and would terminate sooner if its goals were accomplished. Plaintiff-Class' primary argument is that the provision allowing for an extension in the event less than seventy (70) officers were hired was not narrowly tailored.

The provision for an extension in the event seventy (70) officers were not hired in a given year is reasonable, logical, and very closely tied to having the Respondent achieve the stated goals. If the economic conditions faced by the City were such that its hiring would be reduced, or the City were simply to thwart the purposes of the ACD by limiting its hiring, the goals would not be reached. The extension was designed to merely make it more likely that the goals would be met in as reasonable a time as possible.

It cannot be forgotten that once the goals were accomplished, the ACD would terminate – whenever that might be. Moreover, the history of this and related litigation gives further reason for the ACD to have been structured in that fashion. The City acknowledged that its position earlier in this and related litigation changed as the cases progressed from recalcitrant to intent on remedying past discrimination. Its own counsel has stated to the Justices of this very Court as follows:

> "[W]hen this case was filed in 1980, the City of Cleveland had eight years at that point of litigating these types of cases, and eight years of having judges rule against the City of Cleveland. . . . You don't have to beat us on the head. We finally learned what we had to do and what we had to try to do to comply with the law, and it was the intent of the City to comply with the law".

Local No. 93 International Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501, 506 (1986).

It was thus with reasonable caution and attention to the historical facts and background that the extension provision was included in the ACD. Without such a provision, the reasonable goals might not be attained if the size of entry classes of patrolmen was less than anticipated. As noted by the Sixth Circuit below:

> [W]e find that the minimum-70-officer rule made sense for several reasons, including (a) the possibility of financial hardships causing the City to fall short in remedying past discrimination (which was one of the reasons for amending the original consent decree); and (b) the possibility (given the City's prior history of discrimination) that the City might try to thwart the goals of the consent decree by simply freezing hiring or hiring only a relatively few number of officers during the eight-year period of the consent decree.

> *See, e.g., McNamara v. City of Chicago*, 138 F.3d 1219, 1223 (7th Cir. 1998) (noting hiring freeze by the city immediately after it agreed to hire a percentage of minorities for fire department . . .)

The extension provision of the ACD was not designed to delay the termination of the decree but rather served as an assurance that if the goals were not reached because of a decrease in the number of new patrolmen hired in a given year, the goal would not be thwarted. Indeed, that was exactly the problem facing the courts during the litigation history of *United States v. Paradise*, 480 U.S. 149 (1987). There, one of the arguments faced by the District Court in its Order of 1975, in affirming its 1972 Order implementing race-conscious hiring, was to prohibit the Defendant Alabama Department of Public Safety from limiting the hiring class so as to delay the meeting of the goals. (There, the hiring ratio was 1-for-1, initially set to remain in effect until 25% of the troopers were African-American).

There is no basis for Plaintiff-Class' contention that permitting the decree to be applicable for the 1994 class was unconstitutional. The goals had not yet been met, due in part to a decrease in the hiring of patrolmen. Moreover, there was no magic to the 1992 expiration date. Plainly, the constitutionality of the ACD does not depend on whether it expired in 1992 or 1994. Rather, it is the open-endedness of consent decrees that may run afoul of the Constitution. Where, as here, a Consent Decree has a firm expiration date that can be extended for extremely limited seasons designed to promote the achievement of stated goals, the Consent Decree remains narrowly tailored as to duration.

CONCLUSION

The ACD expired in 1994 just as the racial composition of Cleveland's police force reached parity with the relevant labor pool. The Petitioner class, after failing to convince the District Court of its entitlement to injunctive relief in May, 1994 (and after the court reaffirmed the lawful continued application of the ACD) amended its complaint to seek damages against the City based on its compliance with the terms of the ACD. The City's police force has been free of any preferential hiring mandates for well over a decade. It is respectfully submitted that the admittedly lawful ACD – as applied for one hiring cycle in 1994 before its natural expiration, presents a uniquely inappropriate scenario for Supreme Court review.

For the foregoing reasons, Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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